Supreme Court, U.S.
FILED

01 210 JUL 31 2001

OFFICE OF THE CLERK

No. ____

In The

Supreme Court of the United States

SANDRA M. BRUFF,

Petitioner,

v.

NORTH MISSISSIPPI HEALTH SERVICES, INC.;
NORTH MISSISSIPPI MEDICAL CENTER,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

PETITION FOR A WRIT OF CERTIORARI

JIM WAIDE
Ms Bar No.: 6857
(*Counsel of Record*)
WAIDE & ASSOCIATES, P.A.
Attorneys at Law
Post Office Box 1357
Tupelo, MS 38802
Telephone: (662) 842-7324
Facsimile: (662) 842-8056

GRANT M. FOX
Ms Bar No.: 8943
FOX & FOX, P.A.
Attorneys at Law
Post Office Box 797
Tupelo, MS 38802
Telephone: (662) 844-2068
Facsimile: (662) 844-1068

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. WHAT LIMITS, IF ANY, DOES THE SEVENTH AMENDMENT'S PROHIBITION OF RE-EXAMINATION OF JURY VERDICTS PLACE ON AN APPEALS COURT'S AUTHORITY TO SET ASIDE A JURY VERDICT AND RENDER JUDGMENT FOR THE JURY VERDICT LOSER?

2. DOES THE SEVENTH AMENDMENT'S PROHIBITION OF RE-EXAMINATION OF JURY VERDICTS PERMIT AN APPEALS COURT TO REVIEW *DE NOVO* A JURY VERDICT AND AWARD JUDGMENT TO THE JURY VERDICT LOSER?

3. WHAT IS THE TEST FOR DETERMINING WHETHER AN ISSUE IS A QUESTION OF LAW FOR THE COURT OR A QUESTION OF FACT FOR THE JURY?

4. WHERE A COURT OF APPEALS' OPINION POST-DATES *REEVES V. SANDERSON PLUMBING PRODUCTS, INC.*, 530 U.S. 133 (2000), BUT THE COURT OF APPEALS, IN ENTERING JUDGMENT FOR THE JURY VERDICT LOSER DOES NOT CITE *REEVES* AND DISREGARDS *REEVES* BY ACCEPTING AS TRUE THE MOVANT'S EVIDENCE, SHOULD THIS COURT EXERCISE ITS SUPERVISORY POWER TO REVERSE AND REMAND FOR CONSIDERATION IN LIGHT OF *REEVES*?

LIST OF PARTIES

The following is a list of all parties to the proceedings in the Court below, as required by Rule 24.1(b) and Rule 29.1 of the Rules of the Supreme Court of the United States.

1. Sandra M. Bruff, Plaintiff/Petitioner;
2. North Mississippi Health Services, Inc., Defendant/Respondent;
3. North Mississippi Medical Center, Inc., Defendant/Respondent;
4. Jim Waide, Attorney for Plaintiff/Petitioner;
5. Grant M. Fox, Attorney for the Plaintiff/Petitioner;
6. Michael M. Farrell, Attorney for Defendants/Respondents;
7. Earnest R. Malone, Jr., Attorney for Defendants/Respondents; and
8. Luther T. Munford, Attorney for Defendants/Respondents.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 1

STATEMENT OF THE CASE 2

INTRODUCTION 2

FACTS 2

REASONS FOR GRANTING THE WRIT 6

I. THIS COURT SHOULD HEAR THIS CASE TO DETERMINE WHETHER THE SEVENTH AMENDMENT'S RE-EXAMINATION CLAUSE PERMITS AN APPEALS COURT TO SET ASIDE A JURY VERDICT AND RENDER JUDGMENT FOR THE JURY VERDICT LOSER ON THE GROUNDS THAT THE JURY VERDICT WAS NOT REASONABLE 6

II. THE COURT SHOULD HEAR THIS CASE TO DETERMINE THE APPROPRIATE STANDARD OF REVIEW FOR A COURT OF APPEALS IN REVIEWING A DECISION OF A TRIAL JUDGE TO DENY JUDGMENT AS A MATTER OF LAW FOLLOWING A JURY VERDICT 18

III. THIS COURT SHOULD GRANT REVIEW TO DISTINGUISH BETWEEN ISSUES OF LAW AND ISSUES OF FACT SO AS TO LIMIT THE CIRCUMSTANCES UNDER WHICH A COURT OF APPEALS CAN REVERSE JURY VERDICTS AND ENTER JUDGMENTS FOR THE VERDICT LOSER 20

TABLE OF CONTENTS – Continued

Page

IV. THIS COURT SHOULD EXERCISE ITS SUPERVISORY POWER TO REVERSE AND REMAND FOR RECONSIDERATION IN LIGHT OF *REEVES V. SANDERSON PLUMBING PRODUCTS, INC.*, 530 U.S. 133 (2000) 22

CONCLUSION 23

Opinion, U.S. Court of Appeals for the Fifth Circuit, March 28, 2001 .....App. 1

Order Denying Summary Judgment, U.S. District Court, Northern District of Mississippi, Eastern Division, October 1, 1998 .....App. 20

Order Denying Motion for Judgment Notwithstanding the Verdict or for a New Trial, U.S. District Court, Northern District of Mississippi, Eastern Division, February 3, 1999 .....App. 22

Order Denying Rehearing, U.S. Court of Appeals for the Fifth Circuit, May 2, 2001 .....App. 23

Special Interrogatories to the Jury, U.S. District Court, Northern District of Mississippi, Eastern Division, October 20, 1998 .....App. 24

Employment Discrinination Cases (Tables), U.S. Court of Appeals for the Fifth Circuit, July 23, 2001 .....App. 26

Criminal Cases (Tables), U.S. Court of Appeals for the Fifth Circuit, July 19, 2001 .....App. 36

An Editorial, from the Fifth Circuit District Judges Newsletter, April, 2001 .....App. 43

TABLE OF AUTHORITIES

Page

CASES:

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970).....8, 9

Anderson v. City of Bessemer, N.C., 470 U.S. 564 (1985) 17

Anderson v. Liberty Lobby, 477 U.S. 242 (1986)... 8, 9, 11

Baltimore & Carolina Line v. Redman, 295 U.S. 654 (1935) 21

Boeing v. Shipman, 411 F.2d 365 (5th Cir. 1969) 7, 11, 12

Boyd v. State Farm Insurance Companies, 158 F.3d 326 (5th Cir. 1998)..... 21

Bruff v. North Mississippi Health Services, Inc., 244 F.3d 495 (5th Cir. 2001).....1, 22

Concrete Pipe & Products of California, Inc. v. Const. Laborers Pension Trust for Southern California, 508 U.S. 602 (1993) 17

Cooper Industries, Inc. v. Leatherman Tool Group, Inc., ___ U.S. ___, 121 S.Ct. 1678 (2001) 18

Gasperini v. Center for Humanities, Inc., 518 U.S. 415 (1996) 9, 10, 17, 19, 20

Herrold v. Burlington Northern, Inc., 761 F.2d 1241 (8th Cir. 1985)..... 19

Hetzel v. Prince William County, Va., 523 U.S. 208 (1998) 9

Hickman v. Jones, 76 U.S. 197 (1869) 11

Iacurci v. Lummus Co., 387 U.S. 86 (1967)..... 13

Lavender v. Kurn, 327 U.S. 645 (1946)..... 11

TABLE OF AUTHORITIES – Continued

Page

Neely v. Martin K. Eby Const. Co., 386 U.S. 317 (1967) 12, 13

Nichols v. Lewis Grocer, 138 F.3d 563 (5th Cir. 1998) 19

Nunez v. Superior Oil Co., 572 F.2d 1119 (5th Cir. 1978) 21

Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) 10

Patton v. Texas & P. Ry. Co., 179 U.S. 658 (1901) 16

Phillips v. Collings, 2001 WL 811108 (8th Cir. 2001) 20

Price v. Marathon Cheese Corp., 119 F.3d 330 (5th Cir. 1997) 21

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000) ..... *passim*

Travis v. Board of Regents of Univ. of Texas, 122 F.3d 259 (5th Cir. 1997) 19

Vadie v. Mississippi State Univ., 218 F.3d 365 (5th Cir. 2000) 22

Weisgram v. Marley Company, 528 U.S. 440 (2000) 12

STATUTES AND RULES:

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1981a(b)(3)(d) 2

42 U.S.C. § 2000e(2) 4

Fed. R. Civ. P. Rule 50 9

Fed. R. Civ. P. Rule 56 ..... 9, 11

U.S. Const. Amend. VII ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS:

2 The Complete Anti-Federalists 9

William Blackstone, *Commentaries on the Common Law* (1st Ed. 1768) 9

Coker, *The Americans with Disabilities Act, A Windfall for Defendants*, 34 Harv. L.R. 99 (1999) 16, 21

Laura Gaston Dooley, *Our Juries, Ourselves, The Power, Perception, and Politics of the Civil Jury*, 80 Corn. L.R. 325 (1995) 16, 18

Gerald Eagen, *The Skilled Helper*, 112 (1991) 17

Fifth Circuit District Judges Newsletter (April 2001) 15, 16

Robert J. Gregory, *One Too Many Rivers to Cross: Rule 50 Practice in the Modern Area of Summary Judgment*, 23 Fl. St. Univ. L.R. 689 (1996) 16

W. Holdsworth, *A History of English Law*, 298 (7th ed. 1956) 11

M. Horowitz, *The Transformation of American Law*, 28 (1977) 11

Johnston, *Jury Subordination Through Judicial Control*, 43 Law & Contemp. Probs., Autumn 1980, at 24 11

McGinley, *Credulous Courts in the Torts of Trial: The Improper Use of Summary Judgment in Title VII ADEA Cases*, 34 B.C.L. L.R. 203 (1993) 16

A. Mehrabian, *Silent Messages: Implicit Communication of Emotions and Attitudes* (2d ed. Dec. 1990) 17

TABLE OF AUTHORITIES – Continued

Page

Eric Schnapper, *Judges against Juries – Appellate Review of Jury Verdicts*, 1989 Wis. L. Rev. 237...10, 14

Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639 (1973)..... 11

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit is reported at 244 F.3d 495 (5th Cir. 2001). It is attached as Appendix 1-19.

The District Court's Order denying summary judgment is Appendix 20-21. The District Judge's Order denying judgment as a matter of law is Appendix 22.

The order denying Petition for Rehearing dated May 2, 2001 is attached as Appendix 23.

The jury's answers to special interrogatories are Appendix 24-25.

JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Fifth Circuit entered on March 28, 2001, and Petition for Rehearing denied May 2, 2001, by a Writ of Certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution Amendment Seven says:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise

> re-examined in any court of the United States, than according to the rules of the common law.

U.S. Const. Amend. VII.

STATEMENT OF THE CASE

INTRODUCTION

A jury in the United States District Court for the Northern District of Mississippi found that the Petitioner, Sandra M. Bruff, was the victim of employment discrimination based on her Christian religious beliefs. After application of the statutory caps on damages, 42 U.S.C. § 1981a(b)(3)(d), the trial judge entered judgment on the jury verdict in favor of Petitioner in the amount of over $300,000.00. R. Vol. 6, pp. 1413-1414.

Upon appeal, the United States Court of Appeals for the Fifth Circuit reversed and entered judgment for Respondents on the grounds that no reasonable jury could have found in Petitioner's favor.

The Court of Appeals' decision post-dated *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), but the Court of Appeals did not cite *Reeves*. It contradicted *Reeves* by rejecting Petitioner's evidence, relying instead upon evidence introduced by Respondents – evidence which the jury did not believe.

FACTS

Accepting as correct the non-movant's facts, as required by *Reeves, supra*, the facts follow:

> Upon graduation from the Reformed Theological Seminary, Petitioner was hired by the Respondents, based upon community demands for a Christian counselor. (T.T., 185-186).

Respondents assigned Petitioner to work in its Employee Assistance Program ("EAP") (T.T., 187-190), which provides counseling services to businesses in North Mississippi. The businesses pay Respondents a fee in exchange for which the businesses' employees may be counseled on their personal problems. (T., 767) Petitioner became the Respondents' most productive counselor, seeing more patients than any other counselor, and receiving outstanding ratings. (T., 191, 813-814)

In April, 1996, Petitioner first counseled the homosexual patient ("Jane Doe"), whose alleged complaints led to Petitioner's being fired.[1] Petitioner first saw Jane Doe about non-sexual problems, and Doe was pleased with Petitioner's services. (T., 192, 194, 264) However, in early October 1996, Doe asked Petitioner's assistance in assisting her with her homosexual relationship. Petitioner replied that it would not be in the patient's best interest to be counseled by Petitioner because of Petitioner's Christian religious beliefs. Petitioner offered to refer Jane Doe

---

[1] The trial judge sustained Respondents' motion to keep the identity of the homosexual patient, as well as her employer, confidential. Thus, Petitioner could not question the homosexual patient to determine if she really made complaints. The Court of Appeals assumed Respondents' testimony about complaints was true. *Contra, Reeves*, 530 U.S. at 151 (only that evidence of non-movant which the jury is "required to believe" or which comes from "disinterested witnesses" should be accepted as true by a reviewing court). *Reeves*, 530 U.S. at 151, indicates that only evidence from "disinterested witnesses" must be accepted as true.

to one of Respondents' other counselors. (T., 192-193) Such referrals were common at EAP in the case of counselors who did not wish to treat a patient for personal reasons. (T., 602-603, 605, 1080)

Doe replied that she only wanted Petitioner as her counselor, and Petitioner then agreed to see Doe for another counseling session. (T., 194, 281) However, Doe did not appear at the next appointment. Respondents reported to Petitioner that the patient had complained to her employer. (T., 195, 282) Petitioner was then called to a series of meetings and berated by Respondents' officials. (T., 200, 312, 314) Respondents' Behaviorial Health director, Kerlin, instructed Petitioner to go back to work and counsel "everyone who walks in the door or you will be terminated." (T., 202-204)

Petitioner appealed to Respondents' Vice-President (Brown) who informed Petitioner that her only options were to be fired or to find another job within thirty days within the Defendants' facility. (T., 204, 205) During this thirty (30) day period, only one counseling job became open. Bruff applied for it but was rejected in favor of an outside applicant with a higher educational level. (T., 204-205) Petitioner was then terminated, after which she commenced this suit and obtained a jury verdict that she was discriminated against on grounds of her religion, in violation of 42 U.S.C. § 2000e(2).

The Court of Appeals reversed the jury verdict by disregarding *Reeves* and accepting as true the movants' (Respondents') evidence that Petitioner's referring patients to other counselors would cause Respondents "undue hardship." Contradicting *Reeves*, it disregarded

Petitioner's evidence that referring persons whose needs conflicted with a counselor's value system was required by the Rules of Ethics of the counseling profession, and disregarded Petitioner's evidence that other counselors referred patients for non-religious reasons.

While the Fifth Circuit opinion omits it, Dr. Jim Hurley, who is a graduate of Harvard University and holds two (2) Ph.D.s, one from Cambridge University and Florida State University (T., 618), testified that the Rules of Ethics of the counseling profession require counselors to refer patients to another counselor when a counselor deems his or her personal beliefs are inconsistent with the assistance the patient requests. (T., 644) Dr. Hurley testified that, contrary to the Respondents' claim that the Rules of Ethics require a counselor to treat everyone "who walks in the door," the Rules of Ethics require just the opposite (T., 659), and Bruff's offer to refer a patient when there is a conflict in value systems is required by the Rules of Ethics. (T., 646)

Additionally, Petitioner introduced evidence that transferring Petitioner to another department would not be necessary, since other counselors in EAP refer to other counselors.[2]

---

[2] For example, counselor Holmes did not like to counsel individuals who had lost family members due to cancer. (T.T., 605) Counselor Yodell did not like to counsel children (T.T., 1080) and frequently referred children. (T.T., 1080) Petitioner's replacement, Rappaport, was Jewish, and would not counsel neo-Nazis. (T.T., 602-603)

The Court of Appeals disagreed with the jury's factual findings, by finding that these other counselors were more

The Court of Appeals rejected Petitioner's (non-movant's) evidence. It concluded that no reasonable jury could have found for Petitioner, and a reasonable jury would have found that Petitioner's religion posed an undue hardship and that Respondents made reasonable accommodations. According to the Fifth Circuit, a reasonable jury would have found that Respondent made reasonable accommodations when it allowed Petitioner to try (unsuccessfully) to find another counseling job within its facility. 244 F.3d at 501.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD HEAR THIS CASE TO DETERMINE WHETHER THE SEVENTH AMENDMENT'S RE-EXAMINATION CLAUSE PERMITS AN APPEALS COURT TO SET ASIDE A JURY VERDICT AND RENDER JUDGMENT FOR THE JURY VERDICT LOSER ON THE GROUNDS THAT THE JURY VERDICT WAS NOT REASONABLE.

In reversing the jury verdict, the Fifth Circuit did not cite the *Reeves v. Sanderson Plumbing Products, Inc.*, 530

"flexible" than Petitioner. The Court of Appeals even stated, falsely, that Petitioner had not argued that she was just as "flexible" as these persons. In fact, Petitioner did make just such an argument in her brief. Appellant's brief, pp. 22-23. In reversing the jury's verdict, and in entering judgment for the Respondent, the Court of Appeals found, as a matter of law, that Petitioner's desiring to refer to other counselors would create a "undue hardship," and that Respondent's offering to allow Petitioner to look for another job within the hospital (which she did not find) was a "reasonable" accommodation.

U.S. 133 (2000) standard for testing a jury verdict. Instead, it relied upon *Boeing v. Shipman*, 411 F.2d 365 (5th Cir. 1969) (*en banc*) to enter judgment for the jury verdict loser. It quoted the *Boeing* standard as follows:

> If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motion is proper. On the other hand, if there is substantial evidence opposed to the motion, that is, evidence of such quality and weight that reasonable men in the exercise of impartial judgment might reach different conclusions, the motion should be denied, . . .

244 F.3d at 499, *citing Boeing*, 411 F.2d at 374.

Boeing v. Shipman's permitting entry of judgment for the jury verdict loser on grounds that the verdict was not reasonable was entered over a vigorous dissent by Judge Rives: "With deference, I submit the . . . majority opinion has one fundamental weakness. It downgrades the Seventh Amendment . . . " 411 F.2d at 377-378, Rives, J., dissenting.

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000) did not include the "reasonable jury" test utilized by the Fifth Circuit in *Boeing*. *See* 530 U.S. at 150-151. In fact, *Reeves* disapproved of the reasonable jury test by saying:

> In concluding that these circumstances [defendant's impressive evidence of non-discrimination] so overwhelmed the evidence favoring petitioner that no rational trier of fact could have found that petitioner was fired because of his age, the Court of Appeals impermissibly

> substituted its judgment concerning the weight of the evidence for the jury's.

530 U.S. at 153.

However, appeals courts' awarding judgment in favor of the jury verdict loser because the jury's verdict was not "reasonable" may be supported by some of this Court's summary judgment jurisprudence. *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986) stated *summary judgment* may be granted if the evidence "is so one-sided that one party must prevail as a matter of law," 477 U.S. at 243, and stated that on a summary judgment motion a court should determine "whether a jury could reasonably find . . . that the petitioner proved his case . . . " 477 U.S. at 254.

However, concurring in *Anderson v. Liberty Lobby*, Justice Brennan noted that *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970) disapproves of such weighing of the evidence even in summary judgment cases. Justice Brennan described *Adickes* as follows:

> We never reached and did not consider whether the evidence was "one-sided," and had we done so, we clearly would have had to affirm, rather than reverse, the lower courts, since in that case there was no admissible evidence submitted by petitioner, and a significant amount of evidence presented by the defendant tending to rebut the existence of a conspiracy.

Anderson v. Liberty Lobby, 477 U.S. at 263, Justice Brennan concurring.

Assuming, however, that *Anderson v. Liberty Lobby* overrules *Adickes v. S.H. Kress & Co.*, in summary judgment cases, this still does not mean an appeals court can render judgment for the jury verdict loser on the grounds that the jury verdict was not "reasonable" or the evidence "was one-sided." While both *Reeves*, 530 U.S. at 150 (2000) and *Anderson v. Liberty Lobby*, 477 U.S. at 250-51 (1986) state that the Rule 50 JMOL standard "mirrors" the Rule 56 summary judgment standard, neither *Anderson* nor *Reeves* addresses the fact that a Rule 50 motion following a jury verdict must adhere to the Seventh Amendment's Re-Examination Clause. A Rule 56 motion cannot implicate the Re-Examination Clause since the motion for summary judgment is made before a jury verdict.

The Seventh Amendment prohibits the "re-examination of a jury verdict," except "according to the rules of the common law." *See Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 432 (1996); *Hetzel v. Prince William County, Va.*, 523 U.S. 208, 209 (1998).

Allowing an appeals court to enter judgment in favor of the jury verdict loser because the jury verdict was not reasonable is a radical variation from the rules of the common law. According to the *2 The Complete Anti-Federalists*, ¶ 2.8.194:

> By the common law in Great Britain and America, there is no appeal from the verdict of the jury as to facts as to any judge whatsoever.

As put in William Blackstone, *Commentaries on the Common Law*, 405-406 (1st Ed. 1768):

> [T]here is no method of reversing an error in the determination of facts, but by an attaint or a

> new trial, to correct the mistakes of the former verdict.

More recently, Eric Schnapper, *Judges against Juries – Appellate Review of Jury Verdicts*, 1989 Wis. L. Rev. 237, 238 wrote:

> When the Seventh Amendment was originally adopted, there simply was no procedure which a party could utilize to bring before an appellate court any objection to the sufficiency of evidence to support a jury verdict. In the early 19th century, a losing party could rely on such an objection only as grounds for a new trial, and the Supreme Court consistently held that a "trial judge's actions in granting or denying a new trial was a matter of absolute discretion" and could not be reversed on appeal.[3]

Of course, it is true that this Court has held that the Seventh Amendment does not require modern federal courts to follow all of the "niceties" of common law procedure. *Gasperini v. Center for Humanities*, 518 U.S. 415 (1996). But allowing appeals courts to enter judgment for the jury verdict loser on the sole ground that the jury was not reasonable is too radical a departure from the common law rule to conform to the Re-Examination Clause. *See* Chief Justice Rehnquist's dissent in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 338-339 (1979) and Justice Scalia's dissent in *Gasperini v. Center for Humanities*, 518

---

[3] This Court has now held that a decision of a trial judge to deny a new trial may be reviewed upon appeal, but the Seventh Amendment requires that this appellate review be limited to review for "abuse of discretion". *Gasperini v. Center for Humanities*, 518 U.S. 415, 436 (1996).

U.S. 415, 466-468 (1996),[4] both of which convincingly demonstrate this Court has already departed too far from the Seventh Amendment.

Decisions from this Court, such as *Anderson v. Liberty Lobby, supra,* indicating a judge may rule for one party on the grounds that no "reasonable" jury could find for the opposite party or that the evidence is "one-sided" involve only a Rule 56 motion. Thus, these decisions could not address the question of whether the Seventh Amendment's Re-Examination Clause prohibits an appellate court's entering judgment for the judgment loser on the grounds that the jury verdict was not reasonable.

Early on, in finding there was authority of a trial judge to direct a verdict, this Court rationalized such a procedure on the grounds that when there was "no evidence" only a question of law is presented. *Hickman v. Jones,* 76 U.S. 197, 201 (1869); *Accord, Lavender v. Kurn,* 327 U.S. 645, 653 (1946) ("Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear . . . "). Indeed, in dissenting in *Boeing v. Shipman,* Judge Rives cited *Lavender v. Kurn* in arguing that *Boeing v. Shipman* was "an error of constitutional proportions which will continue to

---

[4] Generally, the commentators have agreed with Justice Scalia and Chief Justice Rehnquist, that the courts have departed too far from the Seventh Amendment. *See* M. Horowitz, *The Transformation of American Law,* 28-29, 141-43 (1977); Johnston, *Jury Subordination Through Judicial Control,* 43 Law & Contemp. Probs., Autumn 1980, at 24; W. Holdsworth, *A History of English Law,* 298-350 (7th ed. 1956); Wolfram, *The Constitutional History of the Seventh Amendment,* 57 Minn. L. Rev. 639, 731 (1973).

plague this Court and district courts of this Circuit until the Supreme Court grants certiorari in this or some future case, and corrects the error . . . " 411 F.2d at 378, Rives, J., dissenting.

Regardless of a court's authority to decide a case before submitting it to the jury, it was not until *Neely v. Martin K. Eby Const. Co.*, 386 U.S. 317 (1967) that this Court first held that an appellate court has the authority to enter a judgment NOV for the jury verdict loser. But *Neely* did not precisely define the circumstances when this could be done, saying only that it could be done in "appropriate cases." 386 U.S. at 324. *Accord, Weisgram v. Marley Company*, 528 U.S. 440, 456 (2000) (where there is no evidence aside from incompetent evidence, verdict may be directed on appeal).

Justice White's majority opinion in *Neely* noted entry of judgment by the court of appeals for the jury verdict loser would not be appropriate in all cases. Justice White wrote:

> There are, on the one hand, situations where the defendant's grounds for setting aside the jury's verdict raise questions of subject matter jurisdiction or dispositive issues of law which, if resolved in defendant's favor, must necessarily terminate the litigation. The court of appeals may hold in an employer's suit against a union, for example, that the case is within the exclusive jurisdiction of the National Labor Relations Board, or in a libel suit, that the defendant was absolutely privileged to publish the disputed statement. In such situations, and others like them, there can be no reason whatsoever to

> prevent the court of appeals from ordering dismissal of the action or the entry of judgment for the defendant.

386 U.S. at 326.

> Part of the Court's concern has been to protect the rights of the party whose jury verdict has been set aside on appeal and who may have valid grounds for a new trial, some or all of which should be passed upon by the district court, rather than the court of appeals, because of the trial judge's firsthand knowledge of witnesses, testimony, and issues – because of his 'feel' for the overall case. These are very valid concerns to which the court of appeals should be constantly alert.

Id. at 325.

Subsequently, *Iacurci v. Lummus Co.*, 387 U.S. 86 (1967) indicated the normal procedure when the judgment is reversed for lack of sufficient evidence is to remand to the trial judge for a new trial. *Iacurci* held:

> [W]e think the Court of Appeals erred in directing entry of judgment for respondent; the case should have been remanded to the Trial Judge, who was in the best position to pass upon the question of a new trial in light of the evidence, his charge to the jury, and the jury's verdict and interrogatory answers.

387 U.S. at 88 (1967).

The rate at which federal appeals judges are substituting their view of the facts for those of the jury also indicates that the Courts of Appeals have departed too far from the Seventh Amendment direction that juries be

allowed to decide the facts. According to Eric Schnapper, *Judges Against Juries – Appellate Review of Federal Jury Verdicts*, 1989 Wis. L.R. 237, n. 50:[5]

> Among 208 cases decided in this period (Oct. 1984-Oct. 1985), the appellate courts held in 102 cases that there was insufficiency of the evidence to support the jury's verdict. . . . The overall reversal rate is 49.0 percent, a level impossible to reconcile with either the Seventh Amendment or the controlling Supreme Court cases.

Since Professor Schnapper's study, the forty-nine percent rate of overturning jury verdicts on appeal has grown. In the time period following the decision in *Reeves v. Sanderson Plumbing Products, Inc., supra* (June 12, 2001), the Fifth Circuit has reviewed thirteen plaintiff's jury verdicts in discrimination cases and overturned ten of them on the grounds that the jury verdict was unreasonable or unsupported by substantial evidence. In other words, according to the Fifth Circuit, since *Reeves*, seventy-seven percent of all juries returning verdicts in favor of plaintiff are "unreasonable." During the three-year period immediately preceding *Reeves*, the Fifth Circuit reversed seventy-nine percent of plaintiff's jury verdicts in discrimination cases, twenty-two reversed of twenty-eight cases.[6] *Reeves* has not changed the Fifth Circuit's

---

[5] Schnapper also documented the tendency among the federal judiciary to find that jury verdicts were most often found to be "unreasonable" in employment discrimination, finding that these cases were being reversed at a "58.8 percent." Schnapper at 249.

[6] The Fifth Circuit's reversal of jury verdicts far exceeds the very substantial reversal rate of other circuits. In the three-year

view that the overwhelming majority of juries are unreasonable.[7]

Indeed, the Fifth Circuit's post-*Reeves'* record in finding so many juries unreasonable is so shocking that it has brought protest from one of the circuit's own district judges. District Judge Sam Sparks, writing an editorial in the Fifth Circuit District Judges Newsletter, April 2001, says:

> Now I have read and re-read the Seventh Amendment and still cannot find the fine print stating jury findings may be altered or changed by circuit judges when they believe the finding is wrong. It must take an incredible combination of intellect and life experiences to endow circuit judges with such superior judgment over jurors who have experienced difficulties in life and who observed and listened to the witnesses under the direction of a district judge . . .
>
> The pattern of some of our circuit judges in reversing or altering jury verdicts and making such appellate fact-findings to eliminate jury

---

period before *Reeves*, the other Circuit Courts reversed employment discrimination jury verdicts in favor of plaintiffs fifty-three percent of the time (84 of 159 cases). After *Reeves*, the other circuits have reversed jury verdicts in favor of plaintiffs forty-one percent of time (12 of 29 cases). See App. 29-35.

[7] The pre-*Reeves'* Fifth Circuit cases are listed in App. 26-28. However, according to the Fifth Circuit, these same jurors who are unreasonable over 70 percent of the time in civil cases act "reasonably" in criminal cases. Petitioner's research indicates that only approximately eleven percent of criminal cases have been reversed by the Fifth Circuit since 1997 because findings of guilt were not supported by the evidence. App. 36-42.

> trials make it more and more difficult to defend the integrity of our circuit . . .

Id. at 4, 5.[8]

The remarkable reversal rate of the fact-finding of juries is particularly shocking when it is remembered that most discrimination cases never reach the jury at all since they are dismissed on summary judgment. See McGinley, *Credulous Courts in the Torts of Trial: The Improper Use of Summary Judgment in Title VII ADEA Cases*, 34 B.C.L. L.R. 203 (1993); Laura Gaston Dooley, *Our Juries, Ourselves, The Power, Perception, and Politics of the Civil Jury*, 80 Corn. L.R. 325, 328 (1995); Robert J. Gregory, *One Too Many Rivers to Cross: Rule 50 Practice in the Modern Area of Summary Judgment*, 23 Fl. St. Univ. L.R. 689, 712 (1996); and Coker, *The Americans with Disabilities Act, A Windfall for Defendants*, 34 Harv. L.R. 99 (1999).[9]

This overwhelming rate at which appellate courts, particularly the Fifth Circuit, are overruling the trial judge and finding that jurors were not "reasonable" cannot be reconciled with *Patton v. Texas & P. Ry. Co.*, 179 U.S. 658, 660 (1901):

> Hence it is that seldom an appellate court reverses the action of a trial court in declining to give a peremptory instruction for a verdict . . . [T]he [trial] judge is primarily responsible for the just outcome of the trial. . . . He has the

---

[8] The Newsletter article is attached, App. 43-48.

[9] Professor Coker found that defendants obtained summary judgment without a jury determination in 448 of 575 cases, an incredible rate of 92 percent of cases under the Americans with Disabilities Act.

> same opportunity that jurors have for seeing the witnesses, for noting all those matters in a trial not capable of record, . . . an appellate court will pay large respect to his judgment.

Neither can the reversal rate of jury verdicts be consistent with *Anderson v. City of Bessemer, N.C.*, 470 U.S. 564, 574-75 (1985): "Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of the fact-finding determination at a huge cost in diversion of judicial resources."

The Fifth Circuit's free-wheeling reversal of the fact-finding of jury verdicts should have been prohibited by *Concrete Pipe & Products of California, Inc. v. Const. Laborers Pension Trust for Southern California*, 508 U.S. 602, 623 (1993) which wrote:

> . . . [T]he factfinder is in a better position to make judgments about the reliability of some forms of evidence than a reviewing body acting solely on the basis of a written record of that evidence. Evaluation of the credibility of a live witness is the most obvious example.

Indeed, the reversal rate is irrational. It is a fact of basic psychology that the meaning of a person's statements is more apt to be determined by the tone of his voice, his facial gestures, his voice tone than the mere words themselves.[10] In *Gasperini v. Center for Humanities,*

---

[10] See Gerald Eagen, *The Skilled Helper*, 112 (1991) (actual words contribute seven percent to one's opinion of the speaker; whereas voice tone contributes thirty-eight percent and facial expressions fifty-five percent); A. Mehrabian, *Silent Messages: Implicit Communication of Emotions and Attitudes* (2d ed. Dec.

518 U.S. 415, 438-439 (1996), this Court recognized the institutional advantage of trial judges and jurors over appellate judges in determining facts, since the appellate judges have only the "cold paper record." The "institutional" difference between trial judges and jurors as compared with appellate judges was again noted by this Court in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, ___ U.S. ___, 121 S.Ct. 1678 (2001), see Justice Stevens' majority opinion, 121 S.Ct. at 1688 and see Justice Ginsburg's dissenting opinion, 121 S.Ct. at 1690.

Finally, the widespread disregard of jury verdicts is a dangerous practice since "the marginalization of the jury undermines the democratic vision of full participation and may discourage citizens' respect for the legal system in general." Laura Gaston Dooley, *Our Juries, Ourselves, The Power, Perception, and Politics of the Civil Jury*, 80 Corn. L.R. 325, 328 (1995).

II.

THE COURT SHOULD HEAR THIS CASE TO DETERMINE THE APPROPRIATE STANDARD OF REVIEW FOR A COURT OF APPEALS IN REVIEWING A DECISION OF A TRIAL JUDGE TO DENY JUDGMENT AS A MATTER OF LAW FOLLOWING A JURY VERDICT.

The Court of Appeals in this case reviewed the jury verdict and the judge's denial of JMOL *de novo*. This is consistent with the Fifth Circuit's longstanding practice.

1990) (bodily behavior, facial expressions, physiological reactions are all more significant than words in forming impressions of one's meaning).

Nichols v. Lewis Grocer, 138 F.3d 563, 565 (5th Cir. 1998); *Travis v. Board of Regents of Univ. of Texas*, 122 F.2d 259, 263 (5th Cir. 1997).

However, the Eighth Circuit expressed a different view in *Herrold v. Burlington Northern, Inc.*, 761 F.2d 1241, 1245 (8th Cir. 1985), when it wrote:

> . . . [W]e must give great credence to the findings of the jury and the trial judge. They heard the testimony and reviewed the evidence first hand; . . . Appellate courts should be extremely reluctant to interfere with a verdict where twelve jurors sit though a long trial and an experienced and competent trial judge finds no error in the jury's determination.

Reviewing the decision of the trial judge to deny judgment as a matter of law following a jury verdict is also inconsistent with *Gasperini v. Center for Humanities*, 518 U.S. 415 (1996). *Gasperini* held that in view of the common law limits on appellate review of facts, an appeals court cannot overrule a trial judge's decision to deny a new trial following a jury verdict except where the trial judge abused his discretion.

Gasperini relied on the trial judge and juries having observed the witnesses, whereas the appellate court has only the "cold transcript." *Gasperini*, 418 U.S. at 438, 439. Of course, in considering an appeal on grounds of insufficiency of the evidence, the appeals court also has only the "cold transcript" and is unlikely to make as accurate a determination of the facts as a trial judge and jury who observed the witnesses.

Under *Gasperini*, an appeals court cannot constitutionally reverse the decision of the trial judge denying a new trial following a jury verdict unless there was an abuse of discretion. According to *Gasperini*, a *de novo* standard violates the Seventh Amendment. But the granting by the appeals court of a judgment for the jury verdict loser is a far greater invasion of the jury function than is the granting of a motion for a new trial. If the Seventh Amendment commands an abuse of discretion standard when reviewing a trial judge's decision to deny a motion for a new trial, then the Seventh Amendment also requires an abuse of discretion review when determining whether to enter judgment for the jury verdict loser.

III.

THIS COURT SHOULD GRANT REVIEW TO DISTINGUISH BETWEEN ISSUES OF LAW AND ISSUES OF FACT SO AS TO LIMIT THE CIRCUMSTANCES UNDER WHICH A COURT OF APPEALS CAN REVERSE JURY VERDICTS AND ENTER JUDGMENTS FOR THE VERDICT LOSER.

In this case, the Fifth Circuit overruled the jury and found that there was an "undue hardship" on the employer, and there was no "failure to make reasonable accommodation." *Contra, Phillips v. Collings*, 2001 WL 811108 *5 (8th Cir. 2001).

But the appeals court was without authority to make such a finding unless issues of fact were presented. The very purpose of the Seventh Amendment is to preserve " . . . the common-law distinction between the province of

the court and that of the jury, whereby, . . . issues of law are to be resolved by the court and issues of fact are to be determined by the jury . . . " *Baltimore & Carolina Line v. Redman*, 295 U.S. 654, 657 (1935).

By finding that the questions of "undue hardship" and "reasonable accommodation" are questions of law, the Fifth Circuit has embraced a practice which has resulted in the widespread diminishment of the authority of juries.[11]

The result in this case is repudiation of the Fifth Circuit's practice of two decades ago when Judge Alvin B. Rubin wrote in *Nunez v. Superior Oil Co.*, 572 F.2d 1119, 1126 (5th Cir. 1978), that questions dealing with the "mainsprings of human conduct," or questions which did not require the type of particularized training, one would receive in law school, were questions of fact which must be left to the jury. By deciding these common sense questions of undue hardship and reasonable accommodation as questions of law, the Fifth Circuit has long since departed from *Nunez* and diminished the fact-finding role of juries.[12]

---

[11] Professor Coker found in a recent study that 448 of 575 cases under the Americans with Disabilities Act were decided without intervention of a jury by directed verdicts or summary judgments. *See* Coker, *The Americans with Disabilities Act, A Windfall for Defendants*, 34 Harv. L.R. 99 (1999).

[12] For other recent examples from the Fifth Circuit, see *Price v. Marathon Cheese Corp.*, 119 F.3d 330 (5th Cir. 1997) (appeals court reverses jury verdict by determining that evidence that plaintiff was referred to as an "old cripple" and removed from her job did not mean that she was "regarded" as having a disability); *Boyd v. State Farm Insurance Companies*, 158 F.3d 326

IV.

THIS COURT SHOULD EXERCISE ITS SUPERVISORY POWER TO REVERSE AND REMAND FOR RECONSIDERATION IN LIGHT OF *REEVES V. SANDERSON PLUMBING PRODUCTS, INC.*, 530 U.S. 133 (2000).

In reversing this jury verdict and entering judgment for the jury verdict loser, the Fifth Circuit did not even cite *Reeves v. Sanderson Plumbing Products, Inc.* A comparison of the facts as stated by Petitioner, with the opinion of the Fifth Circuit, demonstrates the Fifth Circuit's disregard of *Reeves*. To give just one example, the Fifth Circuit states:

> Appellants [movant's-Respondent] contend, and the record supports, . . . any accommodation of Bruff in the EAP counselor position would involve more than *de minimis* cost to the Medical Center [thereby constituting an undue hardship].

244 F.3d at 501, App. 12.

This is just backward from *Reeves*. *Reeves* holds that the court must accept as correct the non-movant's (jury verdict winner's) evidence. 530 U.S. at 148. Under the preposterous Fifth Circuit view, an appeals court can

---

(5th Cir. 1998) (Fifth Circuit decides, as a matter of law, that using the term "porch monkey" is not indicative of race discrimination); and *Vadie v. Mississippi State Univ.*, 218 F.3d 365, 372 (5th Cir. 2000) (immediately following *Reeves*, Fifth Circuit finds that proof that defendant gave pretextual reasons for preferring much less qualified native Americans was not evidence of national origin discrimination).

reverse a jury verdict if it finds support in the record to support the jury verdict loser!

This is such a repudiation of the fact-finding of the jury and so directly conflicts with *Reeves* that this Court should, at least, reverse this case and remand to the Fifth Circuit to reconsider in light of *Reeves*.

CONCLUSION

The Writ should be granted to define the limits which the Seventh Amendment's prohibition against re-examination of jury verdicts place on the authority of appeals courts to enter judgment for a jury verdict loser.

Respectfully submitted,

WAIDE & ASSOCIATES, P.A.
Attorneys at Law
Post Office Box 1357
Tupelo, Mississippi 38802
Telephone: 662-842-7324
Facsimile: 662-842-8056

FOX & FOX, P.A.
Attorneys at Law
Post Office Box 797
Tupelo, MS 38802
Telephone: (662) 844-2068
Facsimile: (662) 844-1068

Attorneys for Petitioner

United States Court of Appeals,
Fifth Circuit.

Sandra M. BRUFF, Plaintiff-Appellee-Cross-Appellant,

v.

NORTH MISSISSIPPI HEALTH SERVICES, INC.; North Mississippi Medical Center, Inc., Defendants-Appellants-Cross-Appellees.

No. 99-60175.

March 28, 2001.
Rehearing Denied May 2, 2001.

Jim D. Waide, III (argued), Victor Israel Fleitas, Martin Daniel Crump, Waide, Chandler & Fleitas, Grant Moncrief Fox, Fox & Fox, Tupelo, MS, for Bruff.

Luther T. Munford (argued), Mark D. Fijman, Phelps Dunbar, Michael Farrell, Richard Allen Hammond, Jr., The Kullman Firm, Jackson, MS, Ernest R. Malone, Jr., The Kullman Firm, New Orleans, LA, for North Mississippi Health Services, Inc. and North Mississippi Medical Center, Inc.

Appeal from the United States District Court for the Northern District of Mississippi.

Before POLITZ, SMITH and PARKER, Circuit Judges.

POLITZ, Circuit Judge:

North Mississippi Health Services, Inc. and North Mississippi Medical Center, Inc. appeal the trial court's denial of judgment as a matter of law, contending that whether accommodating religious beliefs constitutes an undue hardship, and whether their accommodation was

reasonable, are questions of law, not questions of fact for the jury. They also appeal the jury's verdict which awards Sandra Bruff back pay and compensatory and punitive damages in her discrimination claim under 42 U.S.C. § 2000e, *et seq.* ("Title VII"). Bruff cross appeals the dismissal of her state law claims, specifically contending that requiring her to counsel homosexuals, and those living in extramarital relationships, about those relationships violated Mississippi sodomy laws, thus making her termination wrongful under a public policy exception to her employed-at-will status. She also appeals the denial of her motion for either reinstatement to her former position or for front pay in lieu thereof. A thorough review of the record persuades that we should reverse the judgment on the Title VII claims and affirm the dismissal of Bruff's state law claims.[1]

BACKGROUND

After graduating from the Reformed Theological Seminary in Jackson, Mississippi, with a master's degree in marriage and family counseling, Bruff was hired as a counselor by North Mississippi Medical Center, Inc.,[2] first as an adolescent counselor, and eventually as a counselor in its Employee Assistance Program ("EAP"). The Medical Center, a non-profit hospital in Tupelo, Mississippi, established the EAP to provide counseling to the employees of various businesses in the region.

---

[1] By consent, this case was tried before the Magistrate Judge.

[2] North Mississippi Health Services, Inc. is the parent corporation of North Mississippi Medical Center.

Bruff was one of three EAP counselors, one of whom also acted as the program's supervisor. Counseling sessions were held during and after regular business hours in Tupelo and Oxford, Mississippi. Typically, only one counselor would travel to a given location on each occasion.

Early in 1996 Bruff counseled a woman identified only as Jane Doe.[3] Several months later Doe returned for further counseling. At that time she informed Bruff that she was a homosexual and she asked for help in improving her relationship with her female partner. Bruff declined to counsel Doe on that subject, advising that homosexual behavior conflicted with her religious beliefs, but offered to continue counseling Doe on other matters.[4] Another counseling session was scheduled but Doe did not appear. Instead, she complained to her employer about Bruff's actions and her employer in turn complained to the Medical Center.

---

[3] In order to maintain the confidentiality of the client company and its employees seeking counseling, Jane Doe was never specifically identified during the trial proceedings.

[4] The Medical Center introduced evidence that professional counseling standards of practice prohibit counselors from discriminating based upon sexual preferences, while Bruff introduced evidence that the counseling rules of ethics require a counselor to disclose to the patient any areas that the counselor is not qualified or capable of counseling on, and that her actions with Doe were in conformance with those rules. We take no position on what professional standards or ethics codes might require in the field of counseling. Our inquiry here is strictly to what extent Title VII requires the Medical Center to accommodate Bruff's religious beliefs.

The supervisory counselor informed Bruff a complaint had been lodged and arranged a meeting to explore the matter. In that meeting Bruff confirmed that she had declined to counsel Doe on improving her homosexual relationship because doing so would conflict with her religious beliefs. Bruff was then directed, per company policy, to put in writing exactly what aspects of her counseling responsibilities she wanted to be excused from. Bruff wrote a letter asking that she "be excused from . . . actively helping people involved in the homosexual lifestyle to have a better relationship with their homosexual partners. This would also include helping persons who have a sexual relationship outside of marriage have a better sexual relationship." She added that her problem was not with counseling the person *per se*, but only with providing assistance in improving the homosexual or extra-marital relationship.

In response to this letter Medical Center management met several times to determine if Bruff's request could be accommodated by shifting responsibilities among the three EAP counselors. Eventually it was determined such an accommodation was not feasible. Management then gave her a letter denying her request, stating "Individuals being seen in accordance with all of our EAP contracts obligates us to treat a wide variety of psychiatric disturbances and clinical issues. Our EAP contracts with our customers do not exclude certain categories or issues for individuals with certain types of issues. You also are not able to determine specific patient care issues in advance. Your request could create an uneven distribution of patient work load." The letter also raised a concern that her request to continue treating an individual

on some issues while declining to treat others might violate established ethical provisions, and they suggested that she contact the Mississippi Board of Examiners for Licensed Professional Counselors. After the meeting Bruff was relieved of her counseling responsibilities and placed on leave without pay.

Bruff appealed this decision to a vice president of the Medical Center who asked whether there would be any other situations when Bruff would not want to counsel a person. Bruff responded that she would not be willing to counsel anyone on any subject that went against her religion. When the possibility of transferring from the EAP to a section specifically performing pastoral or Christian counseling was discussed she demurred, opining that the head of that section held religious views that were more liberal than hers, and that he likely would not tolerate her conservative perspective.

Based upon Bruff's letter and their discussion, the Medical Center's vice president wrote Bruff affirming the decision to deny her request to counsel only on topics that did not conflict with her religion. In his letter the vice president referenced the small size of the EAP staff; the travel and extended hours the counselors must work; the inability to determine beforehand when a trait or topic might arise that would require referring the employee to another counselor, thus requiring either multiple counselors to travel, or scheduling additional counseling sessions at another time; and the additional sessions that introducing a new counselor might require to build the trust relationship necessary to be effective. He underscored that the logistics of accommodating her

request would cause an undue hardship upon the Center, its clients, and the other EAP counselors.

After affirming the denial of Bruff's request, the vice president offered her three options: (1) reconsider her request for accommodation; (2) request a transfer to another position or department in which conflict of care issues were less likely to occur; or (3) resign her position. If she decided to request a transfer, she would be given 30 days to secure another position before she would be terminated.

The Medical Center contacted its in-house employment counselor and asked her to assist Bruff in locating another position within the hospital system. The counselor showed Bruff a list of available openings, and offered her the opportunity to take two tests designed to manifest her aptitudes and interests. Bruff declined to take the tests or to apply for any non-counselor position.[5]

On the day she met with the employment counselor Bruff applied for the position of Psychiatric Assessment Counselor in the Behavioral Health Department, the only counselor opening available at that time. Medical Center

---

[5] The list the employment counselor showed Bruff included several positions outside of the counseling field that would have allowed her to remain in the hospital system, thus retaining her benefits and the ability to apply, on a preferential basis, for a transfer to another counselor position when it became available. Those non-counselor positions, however, generally paid between $7 and $8 an hour, whereas she had been making over $16 an hour as an EAP counselor. Bruff testified she declined the aptitude and interests tests because she already knew what her interests and skills were, *i.e.*, counseling.

policy called for giving current employees 48 hours notice of position vacancies before posting those vacancies with the public, and guaranteeing an interview to current employees who met the minimum position requirements and who applied within that 48 hours. The Psychiatric Assessment Counselor position, however, had already been posted with the public at that point. The record reflects that Bruff's application was considered but another applicant with superior credentials was selected.[6]

While this application was pending, another counselor position became available; however, Bruff chose not to apply.[7] The 30 day continued employment period lapsed and Bruff's employment was terminated. The head of the Behavioral Health Department, when placing the notice of termination in Bruff's file, noted that he would not consider rehiring her for the EAP.

Bruff then filed a complaint with the Equal Employment Opportunity Commission. The EEOC concluded its investigation without action, notifying Bruff that she had

---

[6] The successful applicant had a Ph.D. in a relevant field, as well as marketing experience. Bruff had neither.

[7] Bruff testified that the employment counselor promised to call her when a counseling position became available. She stated that she became aware of the additional opening but did not apply because she felt that if there was any chance of her getting the position the employment counselor would have contacted her. The counselor testified that she told all employees seeking assistance that she was there as a resource, but the responsibility to search was theirs. She posted updated job opening lists three times a week but did not call anyone to advise them of openings, due to the large number of employees in the system.

90 days to file suit if she so desired. The instant action followed.

The matter was tried to a jury, which found that the Medical Center had discriminated against Bruff because of her religious beliefs, that it had not made a reasonable accommodation for those beliefs, and that it had acted with malice or reckless indifference. The jury awarded her $32,738.44 in back pay; $326,000.00 in compensatory damages; and $1,700,000.00 in punitive damages. The trial judge, acting under 42 U.S.C. § 1981a(b)(3)(D), reduced the total compensatory and punitive damages to the statutory maximum of $300,000.00. Back pay is not included in the statutory cap. Bruff's state law claims, which would not have been subject to a similar cap, previously had been dismissed on a motion for directed verdict.

The parties filed several post-trial motions, all of which were denied. The Medical Center and its parent appeal both the trial court's denial of its motion for judgment as a matter of law, and the jury's adverse verdict. Bruff cross-appeals the dismissal of her state law claims, and the denial of her motion for reinstatement, or alternatively, front pay in lieu thereof.

ANALYSIS

We first look at the denial of the Medical Center's motion for judgment as a matter of law, reviewing the denial using the same test used by the trial court:

> The Court should consider all of the evidence – not just that evidence which supports the non-mover's case – but in the light and with all

> reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motion is proper. On the other hand, if there is substantial evidence opposed to the motion, that is, evidence of such quality and weight that reasonable men in the exercise of impartial judgment might reach different conclusions, the motion should be denied. . . . [8]

Appellants do not contest that Bruff established her prima facie case of religious discrimination under Title VII;[9] therefore, the burden shifts to them to show why accommodating her religious beliefs as requested, *i.e.*, allowing her to remain an EAP counselor while only counseling on subjects that do not conflict with her religion, would cause them an undue hardship, or that they have offered an alternative reasonable accommodation to resolve the conflict.[10] Based upon the facts of this case we deem it appropriate to examine each in turn.

---

[8] *Wardlaw v. Inland Container Corporation*, 76 F.3d 1372, 1375 (5th Cir. 1996) (quoting *Boeing v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969) (en banc)).

[9] A prima facie case of religious discrimination is established when an employee can show that: (1) he or she had a bona fide religious belief that conflicted with an employment requirement; (2) the employer was informed of that belief; and (3) the employee was discharged for failing to comply with the conflicting employment requirement. *Weber v. Roadway Express*, 199 F.3d 270 (5th Cir. 2000). The sincerity of Bruff's beliefs has never been questioned.

[10] 42 U.S.C. § 2000e(j).

Accommodation can take place in two fundamental ways: (1) an employee can be accommodated in his or her current position by changing the working conditions, or (2) the employer can offer to let the employee transfer to another reasonably comparable position where conflicts are less likely to arise.

I Retention as an EAP counselor

The Medical Center contends that retaining Bruff in her position as an EAP counselor would cause an undue hardship. The Supreme Court, in *Trans World Airlines v. Hardison,*[11] opined that an undue hardship exists, as a matter of law, when an employer incurs anything more than a *de minimis* cost to reasonably accommodate an employee's religious beliefs.

As earlier noted, the evidence established that the Medical Center employed three counselors in its EAP program, one of whom handled supervisory duties in addition to her counseling responsibilities. Thus, any request by Bruff to refer all subjects desiring to be counseled on something that she felt conflicted with her religious beliefs meant, necessarily, that one of the remaining two counselors must assume that responsibility.[12] This might be accomplished by the other counselors either

---

[11] 432 U.S. 63, 97 S.Ct. 2264, 53 L.Ed.2d 113 (1977).

[12] Bruff does not contend, nor does the record suggest, that under its counseling contracts the Medical Center could merely decline to counsel individuals on certain subjects. Nor would hiring additional counselors be reasonable, given the obvious additional cost.

voluntarily assuming a disproportionate workload, or trading counseling assignments with Bruff, on a *quid pro quo* basis, if available.

Voluntarily accommodating the preferences of other counselors was accepted practice at the EAP, and the record reflects that one of the other EAP counselors disliked counseling young children. She requested that she not be given such assignments, and Bruff and the other counselor agreed to assume that responsibility whenever possible; however, when neither of them could accommodate her preference the original counselor would counsel the child.

Bruff does not suggest that her request for accommodation was similarly flexible; instead, she contends that under Title VII the Medical Center must excuse her from counseling on all subjects of concern at all times. Furthermore, unlike traditional requests for religious accommodation which merely seek to rearrange an employee's schedule, Bruff determined that she would not perform some aspects of the position itself, and her testimony makes it abundantly clear that she was aware of that before applying for the position. Bruff testified that when she initially applied to be an EAP counselor she assumed she would have to counsel homosexuals, but she also assumed she could refer such individuals when they sought counseling on their relationships. Nothing in the record reflects that she raised this issue with her interviewer, or explored how any such conflicts with her religious beliefs could, in fact, be accommodated. Instead, she apparently assumed she would only have to perform those aspects of the position she found acceptable. Title

VII does not require an employer to accommodate such an inflexible position.[13]

Appellants contend, and the record supports, that given the size of the EAP staff, the area covered by the program and the travel involved, and the nature of psychological counseling incorporating trust relationships developed over time, any accommodation of Bruff in the EAP counselor position would involve more than *de minimis* cost to the Medical Center. Requiring one or both counselors to assume a disproportionate workload, or to travel involuntarily with Bruff to sessions to be available in case a problematic subject area came up, is an undue hardship as a matter of law.[14] Requiring the Center to schedule multiple counselors for sessions, or additional counseling sessions to cover areas Bruff declined to address, would also clearly involve more than *de minimis* cost.[15]

The trial court, in denying the Medical Center's motion for a directed verdict, acknowledged these as

---

[13] *See Weber*, 199 F.3d at 275 (finding secular, flexible exceptions to be *de minimis*, whereas inflexible religious exceptions affecting other employees are not).

[14] *Weber*, 199 F.3d at 274 ("The mere possibility of an adverse impact on co-workers . . . is sufficient to constitute an undue hardship."). *See also Brener v. Diagnostic Center Hospital*, 671 F.2d 141 (5th Cir. 1982) (same).

[15] There was also testimony that substituting counselors would have a potential negative impact upon those being counseled. While adding weight to our decision, we feel the logistical and economic impact on the Medical Center and the other counselors alone establishes, as a matter of law, that accommodating Bruff would result in more than *de minimis* cost.

possible hardships to the Medical Center, but found them to be speculative and theoretical. We do not agree. Title VII does not require an employer to actually incur accommodation costs before asserting that they are more than *de minimis.*[16] Further, this situation did not arise from speculation, but from actual experience with Jane Doe and the subsequent concern raised by her employer that other homosexual employees might decline to seek such counseling as a result.

As evidenced by the letter to Bruff initially denying her request, the counseling contracts between the Medical Center and its client companies do not limit the scope of the areas subject to counseling. Considering that Bruff's expressed requirement to be excused from counseling on any subjects that might conflict with her religious beliefs essentially would give her unlimited authority to determine what those conflicts are, and when she must be accommodated, more conflicts would appear to be givens.

II Transfer to another counselor position

Title VII does not restrict an employer to only those means of accommodation that are preferred by the

---

[16] *See Weber,* 199 F.3d at 274-75 (proposed accommodations can be evaluated as to cost and impact without waiting for them to be implemented, or even waiting for a conflict to occur). The instant action was tried before *Weber;* thus, the trial judge did not have that opinion for guidance.

employee.[17] Once the Medical Center establishes that it offered Bruff a reasonable accommodation, even if that alternative is not her preference, they have, as a matter of law, satisfied their obligation under Title VII.

The Medical Center contends that its offer to give Bruff 30 days, and the assistance of its in-house employment counselor, to find another position at the Center where the likelihood of encountering further conflicts with her religious beliefs would be reduced fulfilled its obligations to offer her a reasonable accommodation. We agree.

In her brief Bruff erroneously cites *Riel v. Electronic Data Systems Corp.*[18] as authority for her contention that "by definition, giving one the same opportunities as are available to all other persons is not an 'accommodation.' " *Riel*, which is an ADA case, noted that most discrimination statutes preclude treating persons differently, whereas the ADA, by requiring reasonable accommodation of a person's disabilities, "shifts away from similar treatment to different treatment. . . . "[19] In addition to the distinctions between the definitions of "reasonable

---

[17] *Ansonia Board of Education v. Philbrook*, 479 U.S. 60, 68, 107 S.Ct. 367, 93 L.Ed.2d 305 (1986) ("By its very terms the statute directs that any reasonable accommodation by the employer is sufficient to meet its accommodation obligation."). *See also Equal Employment Opportunity Commission v. Universal Manufacturing Corp.*, 914 F.2d 71, 73 (5th Cir. 1990) ("Offered an accommodation [that is reasonable], the employee cannot insist upon a specific or more beneficial one."); *and Eversley v. MBank Dallas*, 843 F.2d 172, 176 (5th Cir. 1988) (same).

[18] 99 F.3d 678 (5th Cir. 1996).

[19] *Id.* at 681.

accommodation" and "undue hardship" found in the ADA and those developed by the cases under Title VII,[20] Bruff confuses different treatment with preferential treatment. Here, it was giving Bruff the opportunity to transfer once she stated she would not perform all aspects of her job description, instead of simply terminating her as an at-will employee refusing to fulfill her job responsibilities, that served to treat her differently from other employees because her actions were protected by Title VII.

When the Medical Center gave Bruff 30 days to find another position, it also alerted its in-house employment counselor to the situation and directed that Bruff be given assistance in that effort.[21] The record reflects that Bruff was advised of, and applied for, another counselor position. Although she was not successful, the Medical Center

---

[20] *Compare e.g.*, 42 U.S.C. § 12111(10)(A) ("[Under the ADA] the term 'undue hardship' means an action requiring significant difficulty or expense[.]"); *with Hardison*, 432 U.S. at 84, 97 S.Ct. 2264 (under Title VII anything more than *de minimis* expense is an undue hardship).

[21] On September 5, 1996, just weeks before the events at issue here took place, the decision in *Howard v. North Mississippi Medical Center*, 939 F.Supp. 505 (N.D.Miss.1996), was filed. *Howard* was an ADA case involving the Medical Center and a plaintiff represented by the same counsel representing Bruff. In that opinion Chief Judge Senter found that the 30 day transfer policy utilized by the Medical Center, including the assistance of the in-house employment counselor, was a reasonable accommodation under the ADA. *Id.* at 510. While that opinion does not bind us here, we believe the Medical Center was certainly reasonable in believing that, based on *Howard*, it was complying with the requirements of Title VII by offering Bruff the same opportunity it afforded Howard under the ADA.

was not obligated to give Bruff preference over others with superior credentials when filling the Psychiatric Assessment Counselor position.[22] Bruff was also advised of other available positions, which she declined to apply for, as well as the availability of tests that might illuminate whether positions she might not otherwise consider might be of interest.[23] She declined to even consider a transfer to the pastoral counseling department because she speculated there might be a personal conflict with its director. It is not clear from the record that there was, in fact, an opening available in the pastoral counseling department when the option was proffered. Of importance here, however, is the fact that Bruff refused to even consider that option before the existence of a vacancy

---

[22] It is axiomatic that preferential treatment involves discriminating against one in favor of another, which, in the context of religion, is exactly the conduct proscribed by Title VII. An employer cannot give preference to an employee because of his or her religion any more than it can discriminate *against* that employee for the same reason. *See e.g., Hardison,* 432 U.S. at 81, 97 S.Ct. 2264 ("It would be anomalous to conclude that by 'reasonable accommodation' Congress meant that an employer must deny [the rights] of some employees in order to accommodate or prefer the religious needs of others, and we conclude that Title VII does not require an employer to go that far.").

[23] As previously noted, these non-counselor positions would have required Bruff to take a significant reduction in salary. This alone, however, does not make the accommodation unreasonable. *See e.g., Hardison,* 432 U.S. at 73, 97 S.Ct. 2264 (requiring employee to take unpaid leave to observe religious practices was reasonable); *and Eversley,* 843 F.2d at 176 ("[S]imply because the proposed accommodation would involve some cost to the employee does not make it unreasonable.") (citing *Hardison*).

could be explored. Similarly, her testimony that she declined to apply for the second counselor position when she learned of that opening, because she didn't think the Medical Center would seriously consider her, was based upon pure speculation. An employee has a duty to cooperate in achieving accommodation of his or her religious beliefs, and must be flexible in achieving that end.[24] Bruff displayed almost no such cooperation or flexibility.

Bruff contends that, in any event, whether the Medical Center's transfer offer was reasonable or not is a jury question, which the trial judge and this court should not disturb. Ordinarily, that might be the case.[25] Here, however, the facts and inferences point so strongly and overwhelmingly in favor of the Medical Center that reasonable men could not arrive at a contrary verdict, and denial of the motion for judgment as a matter of law was error.

---

[24] *See, e.g., Brener,* 671 F.2d at 145-46 ("The cases confirm what the statute's use of the term 'reasonable' suggests: bilateral cooperation is appropriate in the search for an acceptable reconciliation of the needs of the employee's religion and the exigencies of the employer's business."). Because there was some conflicting testimony as to whether Bruff or the employment counselor was responsible for ensuring that Bruff was made aware of all vacancies that came open after their initial meeting, and because in this analysis we must consider all evidence in the light most favorable to Bruff, we do not find that her subsequent failure to check the updated vacancy lists displayed a lack of cooperation on her part.

[25] *Universal Manufacturing,* 914 F.2d at 73 ("Ordinarily, questions of reasonableness are best left to the factfinder.").

III Bruff's State Law Claims

Bruff contends that by asking her to counsel clients on improving homosexual or extramarital relationships, Appellants were asking her to violate Mississippi state sodomy laws which make certain sexual acts unlawful. Nothing in the record suggests that she, or any other counselor, was ever asked to counsel anyone on the performance of sexual acts, nor that she ever raised any such concern with anyone. We find that argument specious, and we agree with the trial court that this is strictly a Title VII religious discrimination case. Accordingly, we affirm the trial court's dismissal of Bruff's state law claims.

CONCLUSION

The evidence, considered in the light most favorable to Bruff, clearly established that requiring the Medical Center to accommodate her while retaining her in the position of EAP counselor would involve more than *de minimis* cost and therefore is, as a matter of law, an undue hardship. Further, the Medical Center's offer to give Bruff 30 days to transfer to another position where conflict of care issues were less likely to arise was beyond peradventure a reasonable accommodation. Accordingly, the trial court erred in denying Appellants' Motion for Judgment as a Matter of Law.

For those reasons, the judgment of the trial court on Bruff's state law claims is AFFIRMED. The judgment on

her Title VII claims is REVERSED, and judgment is RENDERED herein for Defendants/Appellants dismissing Bruff's demands with prejudice.[26]

---

[26] Because of our rulings here, we need not reach the remaining issues on appeal.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

SANDRA BRUFF — PLAINTIFF

VS. — CIVIL NO. 1:97CV237-JAD

NORTH MISSISSIPPI HEALTH SERVICES, INC. — DEFENDANT

ORDER DENYING SUMMARY JUDGMENT

Sandra Bruff was employed as a counselor in the Employee Assistance Program at North Mississippi Medical Center, Inc. (NMMC) for two years. She sues for religious discrimination under Title VII in the termination of her employment following her refusal to counsel any patient regarding maintaining a homosexual lifestyle and other issues about which she had religious scruples.

Defendant has moved for summary judgment. The first ground argued is that plaintiff has sued the wrong corporation. After her separation, Bruff filed an EEOC charge against her former employer, NMMC, but when she filed this lawsuit, she sued her employer's parent corporation, North Mississippi Health Services, Inc. (NMHS), which, defendant claims, never employed Ms. Bruff. This issue was mooted at the pretrial conference by the amendment of the pleadings to add NMMC as a defendant.

All remaining issues are in dispute. While the defendant does not contest the sincerity of Bruff's religious beliefs, the parties conflict greatly when it comes to issues of accommodation, retaliation and violation of ethical

standards and public policy. To prevail on a Fed.R.Civ.P. 56 motion, movant must convince the court that there is no genuine issue of material fact and that movant is entitled to judgment as matter of law. This the defendant has failed to do. In any event, the court has the discretion, which it exercises here, to allow the Plaintiff's claims to proceed to trial. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) ("Neither do we suggest . . . that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial."). The motion will be denied.

SO ORDERED this 1st day of October, 1998.

/s/ Jerry A. Davis
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

SANDRA M. BRUFF — PLAINTIFF

V.

CIVIL ACTION NO. 1:97CV237-JAD

NORTH MISSISSIPPI HEALTH SERVICES, INC., ET AL — DEFENDANTS

ORDER DENYING MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR FOR A NEW TRIAL

The court has reviewed the myriad reasons asserted by the defendants for judgment notwithstanding the verdict or for a new trial and finds that none of the stated reasons has merit. Accordingly, the defendants' motion for judgment notwithstanding the verdict or for a new trial is **denied.**

SO ORDERED this 3d day of February, 1999.

/s/ Jerry A. Davis
JERRY A. DAVIS
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-60175

SANDRA M BRUFF

Plaintiff - Appellee-Cross-Appellant

v.

NORTH MISSISSIPPI HEALTH SERVICES, INC;
NORTH MISSISSIPPI MEDICAL CENTER, INC

Defendants - Appellants-Cross-Appellees

Appeals from the United States District Court for the Northern District of Mississippi, Aberdeen

---

ON PETITION FOR REHEARING

(Filed May 2, 2001)

Before POLITZ, SMITH, and PARKER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is **denied**.

ENTERED FOR THE COURT:

/s/ Henry A. Politz
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

SANDRA BRUFF — PLAINTIFF

V. — CIVIL ACTION NO. 1:97CV237-JAD

NORTH MISSISSIPPI HEALTH SERVICES, INC. AND NORTH MISSISSIPPI MEDICAL CENTER — DEFENDANTS

SPECIAL INTERROGATORIES TO THE JURY

1. Who was the employer of plaintiff?

   _____ North Mississippi Health Services, Inc.

   _____ North Mississippi Medical Center.

   _X_ Both.

   Proceed to the next question.

2. Did the defendants make a reasonable accommodation to plaintiff's religious beliefs by allowing her to utilize the transfer policy open to all employees?

   _____ Yes _X_ No

If your answer is yes, go no further; your verdict must be for the defendants.

If your answer is no, proceed to the next question.

3. Would plaintiff's request for an accommodation of her religious beliefs by remaining an EAP counselor and referring to another counselor those patients whose problems conflicted with her religious beliefs cause an undue hardship to the defendants?

   _____ Yes _X_ No

If your answer is yes, go no further; your verdict must be for the defendants.

If your answer is no, proceed to the next question.

4. Subsequent to her termination, did the plaintiff disclose confidential information concerning a patient that she had counseled?

_____ Yes _X_ No

Proceed to the next question.

5. Were the actions of the defendants in regard to plaintiff's termination done with malice or reckless indifference?

_X_ Yes _____ No

If you answer is yes, you may award punitive damages in any amount consistent with the court's instructions.

If your answer is no, you may not award punitive damages.

6. What is the amount of plaintiff's damages?

$ 32,738.44 back pay

$ 326,000.00 compensatory

$1,700,000.00 punitive

/s/ Joe Holloway
FOREPERSON

10/20/98
DATE

5th Circuit Court Of Appeals

Employment Discrimination Cases

July 23, 2001

	Total Jury Verdicts For Plaintiff	Action On Grounds Of Sufficiency Of The Evidence			
		Jury Verdicts Upheld		Jury Verdicts Reversed*	
Jan 1, 1997 - Jun 12, 2000 (Before Reeves)	28	6	21%	22	79%
Jun 13, 2000 - Jul 15, 2001 (After Reeves)	13	3	23%	10	77%
	41	**9**	**22%**	**32**	**78%**

*Includes both reversal of verdict and reversal of damages.

5th Circuit Court Of Appeals

Employment Discrimination Cases

July 23, 2001

Before Reeves v. Sanderson Plumbing Products, Inc.

	Title	Citation	Circuit	Date	Year	Type Of Discrimination	Type Of Decision	District Court Found For	Decision On Appeal
1	Harrington v. Harris	118 F.3d 359	5th Cir.(Tex.)	Jul 21	1997	Speech, Race	Judgment Upon Jury Verdict	Plaintiff	Affirmed
2	Williamson v. City of Houston Tex.	148 F.3d 462	5th Cir.(Tex.)	Jul 22	1998	Sexual Harassment	Judgment Upon Jury Verdict	Plaintiff	Affirmed
3	Butler v. Ysleta Independent School Dist.	161 F.3d 263	5th Cir.(Tex.)	Nov 16	1998	Gender	Judgment Upon Jury Verdict	Plaintiff	Affirmed
4	Sharp v. City Of Houston	164 F.3d 923	5th Cir.(Tex.)	Jan 12	1999	Sexual Harassment, Speech	Judgment Upon Jury Verdict	Plaintiff	Affirmed
5	Smith v. Berry Co.	165 F.3d 390	5th Cir.(La.)	Feb 01	1999	Age	Jury Verdict	Plaintiff	Affirmed
6	Rizzo v. Children's World Learning Ctrs Inc	213 F.3d 209	5th Cir.(Tex.)	May 26	2000	Disability	Judgment Upon Jury Verdict	Plaintiff	Affirmed
6	Plaintiff Affirmed								

1	Mattern v. Eastman Kodak Co.	104 F.3d 702	5th Cir.(Tex.)	Jan 16	1997	Sexual Harassment	Judgment Following Jury Trial	Plaintiff	Reversed
2	Swanson v. General Services Admin.	110 F.3d 1180	5th Cir.(La.)	Apr 24	1997	Race, retaliation	Jury Verdict	Plaintiff	Reversed
3	Powers v. Vista Chemical Co.	109 F.3d 1089	5th Cir.(La.)	Apr 11	1997	Whistleblower	Judgment Upon Jury Verdict	Plaintiff	Reversed
4	Price v. Marathon Cheese Corp.	119 F.3d 330	5th Cir.(Miss.)	Jul 31	1997	Age, Disability, FMLA	Judgment As Matter Of Law	Plaintiff	Reversed
5	Travis v. Board of Regents of the University of T	122 F.3d 259	5th Cir.(Tex.)	Sep 08	1997	Gender, retaliation	Judgment Upon Jury Verdict	Plaintiff	Reversed
6	Migis v. Pearle Vision Inc.	135 F.3d 1041	5th Cir.(Tex.)	Mar 10	1998	Gender	Jury	Plaintiff	Reversed
7	Denton v. Morgan	136 F.3d 1038	5th Cir.(Tex.)	Mar 23	1998	First Amendment, retaliation	Jury Verdict	Plaintiff	Reversed
8	Nichols v. Lewis Grocer	138 F.3d 563	5th Cir.(La.)	Apr 03	1998	Gender	Judgment Upon Jury Verdict	Plaintiff	Reversed
9	Pryor v. Trane Co.	138 F.3d 1024	5th Cir.(Tex.)	Apr 24	1998	Disability	Jury Verdict	Defendant	Affirmed
10	Jones v. Kerrville State Hosp.	142 F.3d 263	5th Cir.(Tex.)	Jun 04	1998	Disability	Judgment Upon Jury Verdict	Plaintiff	Reversed
11	Douglas v. DynMcDermott Petroleum Operations	144 F.3d 364	5th Cir.(La.)	Jun 18	1998	Gender, Race	Judgment Upon Jury Verdict	Plaintiff	Reversed
12	Scott v. University of Mississippi	148 F.3d 493	5th Cir.(Miss.)	Jul 27	1998	Age	Jury Verdict	Plaintiff	Reversed
13	Deffenbaugh-Williams v. Wal-Mart Stores Inc.	156 F.3d 581	5th Cir.(Tex.)	Sep 24	1998	Race	Judgment Upon Jury Verdict	Plaintiff	Reversed
14	Krystek v. University Of Southern Mississippi	164 F.3d 251	5th Cir.(Miss.)	Jan 14	1999	Gender	Judgment Upon Jury Verdict	Plaintiff	Reversed
15	Nero v. Industrial Molding Corporation	167 F.3d 921	5th Cir.(Tex.)	Mar 02	1999	FMLA	Judgment Following Jury Trial	Plaintiff	Reversed
16	Reeves v. Sanderson Plumbing Products Inc.	197 F.3d 688	5th Cir.(Miss.)	Apr 22	1999	Age	Judgment Upon Jury Verdict	Plaintiff	Reversed
17	Deffenbaugh-Williams v. Wal-Mart Stores Inc.	188 F.3d 278	5th Cir.(Tex.)	Aug 31	1999	Race	Judgment Upon Jury Verdict	Plaintiff	Reversed
18	Skidmore v. Precision Printing And Packaging	188 F.3d 606	5th Cir.(Tex.)	Sep 13	1999	Sexual Harassment	Judgment Following Jury Trial	Plaintiff	Reversed
19	Rutherford v. Harris County Tex.	197 F.3d 173	5th Cir.(Tex.)	Nov 29	1999	Disparate treatment	Judgment After Jury Trial	Plaintiff	Affirmed
20	Garcia v. City of Houston	201 F.3d 672	5th Cir.(Tex.)	Feb 09	2000	Race, National Origin	Judgment Upon Jury Verdict	Defendant	Affirmed
21	Vance v. Union Planters Corporation	209 F.3d 438	5th Cir.(Miss.)	Apr 25	2000	Sex	Jury Verdict	Plaintiff	Reversed
22	Wyvill v. United Companies Life Ins. Co.	212 F.3d 296	5th Cir.(La.)	May 31	2000	Age	Judgment As Matter Of Law	Plaintiff	Vacated
22	Plaintiff Reversed								

5th Circuit Court Of Appeals

Employment Discrimination Cases

July 23, 2001

	Title	Citation	Circuit	Date	Year	Type Of Discrimination	Type Of Decision	District Court Found For	Decision On Appeal
28	**Cases Before Reeves**		**Plaintiff Affirmed:**	**6**	**21.4%**				
			Plaintiff Reversed:	**22**	**78.6%**				

After Reeves v. Sanderson Plumbing Products, Inc.

1	Thomas v. Texas Dept Of Criminal Justice	220 F.3d 389	5th Cir.(Tex.)	Jul 25	2000	Gender, Race, Retaliation	Judgment Upon Jury Verdict	Plaintiff	Affirmed
2	Russell v. McKinney Hospital Venture	235 F.3d 219	5th Cir.(Tex.)	Dec 06	2000	Age	Judgment As Matter Of Law	Defendant	Reversed
3	Flowers v. Southern Regional Physician Service	247 F.3d 229	5th Cir.(La.)	Mar 30	2001	Disability	Judgment Upon Jury Verdict	Plaintiff	Affirmed
3	Plaintiff Affirmed								
1	Williams v. Trader Publishing Company	218 F.3d 481	5th Cir.(Tex.)	Jul 24	2000	Gender	Jury	Plaintiff	Reversed
2	Reed v Petroleum Helicopters Inc	218 F.3d 477	5th Cir.(La.)	Jul 24	2000	Disability	Dismissed	Defendant	Affirmed
3	Vadie v. Mississippi State University	218 F.3d 365	5th Cir.(Miss.)	Jul 05	2000	Race, National Origin	Judgment Upon Jury Verdict	Plaintiff	Reversed
4	Rubenstein v. Administrators Of The Tulane Ed	218 F.3d 392	5th Cir.(La.)	Jul 06	2000	Religion, National Origin	Jury	Plaintiff	Reversed
5	Brown v. Kinney Shoe Corp.	237 F.3d 556	5th Cir.(Tex.)	Jan 15	2001	Hostile Working Environment	Judgment Upon Jury Verdict	Plaintiff	Reversed
6	Bruff v. North MS Health Services	244 F.3d 495	5th Cir.(Miss.)	Mar 28	2001	Religion	Judgment Upon Jury Verdict	Plaintiff	Reversed
7	Oden v. Oktibbeha County Miss.	246 F.3d 458	5th Cir.(Miss.)	Mar 27	2001	Race	Judgment Upon Jury Verdict	Plaintiff	Reversed
8	Giles v. General Elec. Co.	245 F.3d 474	5th Cir.(Tex.)	Mar 19	2001	Race	Judgment Upon Jury Verdict	Plaintiff	Reversed
9	Serna v. City Of San Antonio	244 F.3d 479	5th Cir.(Tex.)	Mar 26	2001	Whistleblower	Judgment Upon Jury Verdict	Plaintiff	Reversed
10	McKenzie v. Lee	246 F.3d 494	5th Cir.(La.)	Apr 05	2001	Race	Jury Verdict	Plaintiff	Reversed
10	Plaintiff Reversed								
13	**Total Cases After Reeves**		**Plaintiff Affirmed:**	**3**	**23.1%**				
			Plaintiff Reversed:	**10**	**76.9%**				

U.S. Court Of Appeals
Excluding 5th Circuit
Employment Discrimination Cases
July 23, 2001

	Total Jury Verdicts For Plaintiff	Action On Grounds Of Sufficiency Of The Evidence			
		Jury Verdicts Upheld		Jury Verdicts Reversed*	
Jan 1, 1997 - Jun 12, 2000 (Before Reeves)	159	75	47%	84	53%
Jun 13, 2000 - Jul 15, 2001 (After Reeves)	29	17	59%	12	41%
Total	**188**	**92**	**49%**	**96**	**51%**

*Includes both reversal of verdict and reversal of damages.

U.S. Court Of Appeals

Excluding 5th Circuit

July 23, 2001

Before Reeves v. Sanderson Plumbing Products, Inc.

	Title	Citation	Circuit	Date	Year	Type Of Discrimination	Type Of Decision	District Court Found For	Decision On Appeal
1	Scott-Harris v. City of Fall River	134 F.3d 427	1st Cir.(Mass.)	Jan 15	1997	Speech	Judgment Upon Jury Verdict	Plaintiff	Affirmed
2	Thornley v. Penton Pub. Inc.	104 F.3d 26	2nd Cir.(Conn.)	Jan 07	1997	Age	Judgment Following Jury Trial	Plaintiff	Affirmed
3	Ryther v. KARE 11	108 F.3d 832	8th Cir.(Minn.)	Mar 06	1997	Age	Judgment Upon Jury Verdict	Plaintiff	Affirmed
4	Dailey v. Societe Generale	108 F.3d 451	2nd Cir.(N.Y.)	Mar 05	1997	Gender	Judgment Upon Jury Verdict	Plaintiff	Affirmed
5	Morrison v. Carleton Woolen Mills Inc.	108 F.3d 429	1st Cir.(Me.)	Mar 19	1997	Sex, Disability	Judgment Following Jury Trial	Plaintiff	Affirmed
6	Curtis v. Electronics & Space Corp.	113 F.3d 1498	8th Cir.(Mo.)	May 28	1997	Age	Jury Verdict	Plaintiff	Affirmed
7	Doane v. City of Omaha	115 F.3d 624	8th Cir.(Neb.)	Jun 16	1997	Disability	Judgment Upon Jury Verdict	Plaintiff	Affirmed
8	E.E.O.C. v. Pape Lift Inc.	115 F.3d 676	9th Cir.(Or.)	Jun 02	1997	Age	Judgment As Matter Of Law	Defendant	Reversed
9	Molloy v. Blanchard	115 F.3d 86	1st Cir.(R.I.)	Jun 10	1997	Gender, Title VII	Judgment Upon Jury Verdict	Plaintiff	Affirmed
10	Mason v. Oklahoma Turnpike Authority	115 F.3d 1442	10th Cir.(Okla.)	Jun 11	1997	Speech	Judgment Upon Jury Verdict	Plaintiff	Affirmed
11	Bevan v. Honeywell Inc.	118 F.3d 603	8th Cir.(Minn.)	Jul 03	1997	Age	Judgment Upon Jury Verdict	Plaintiff	Affirmed
12	Maschka v. Genuine Parts Co.	122 F.3d 566	8th Cir.(Neb.)	Aug 11	1997	Age	Judgment Upon Jury Verdict	Plaintiff	Affirmed
13	Carter v. DecisionOne Corp. Through C.T. Corp.	122 F.3d 997	11th Cir.(Ga.)	Sep 18	1997	Age, Gender	Judgment Following Jury Trial	Plaintiff	Affirmed
14	Kline v. Tennessee Valley Authority	128 F.3d 337	6th Cir.(Tenn.)	Oct 15	1997	Age, Title VII	Judgment Following Jury Trial	Defendant	Reversed
15	Stratton v. Department for the Aging for City of N	132 F.3d 869	2nd Cir.(N.Y.)	Oct 16	1997	Age	Judgment Upon Jury Verdict	Plaintiff	Affirmed
16	Eskra v. Provident Life & Acc. Ins. Co.	125 F.3d 1406	11th Cir.(Fla.)	Oct 27	1997	Age	Jury Verdict	Plaintiff	Affirmed
17	Lucas v. J.C. Penney Co. Inc.	131 F.3d 147	9th Cir.(Wash.)	Nov 21	1997	Race	Jury Verdict	Plaintiff	Affirmed
18	Delph v. Dr. Pepper Bottling Co. of Paragould In	130 F.3d 349	8th Cir.(Mo.)	Dec 05	1997	Race	Judgment Upon Jury Verdict	Plaintiff	Affirmed
19	Buntin v. Breathitt County Bd. of Educ.	134 F.3d 796	6th Cir.(Ky.)	Jan 21	1998	Gender	Judgment As Matter Of Law	Defendant	Reversed
20	Reinhold v. Com. of Virginia	135 F.3d 920	4th Cir.(Va.)	Feb 06	1998	Gender	Judgment Following Jury Trial	Plaintiff	Affirmed
21	Mockler v. Multnomah County	140 F.3d 808	9th Cir.(Or.)	Mar 31	1998	Sexual Harassment, Retaliation	Judgment Upon Jury Verdict	Plaintiff	Affirmed in part
22	White v. Honeywell Inc.	141 F.3d 1270	8th Cir.(Minn.)	Apr 20	1998	Race, Retaliatory Discharge	Judgment Following Jury Trial	Defendant	Reversed
23	Kelley v. Airborne Freight Corp.	140 F.3d 335	1st Cir.(Mass.)	Apr 07	1998	Age	Judgment Upon Jury Verdict	Plaintiff	Affirmed
24	Cross v. Cleaver	142 F.3d 1059	8th Cir.(Mo.)	Apr 10	1998	Sexual Harassment	Judgment Upon Jury Verdict	Plaintiff	Affirmed
25	Stolzenburg v. Ford Motor Co.	143 F.3d 402	8th Cir.(Mo.)	Apr 30	1998	Age	Judgment Upon Jury Verdict	Plaintiff	Affirmed
26	Troy v. Bay State Computer Group Inc.	141 F.3d 378	1st Cir.(Mass.)	Apr 14	1998	Gender	Judgment Following Jury Trial	Plaintiff	Affirmed
27	Dichner v. Liberty Travel	141 F.3d 24	1st Cir.(Mass.)	Apr 13	1998	Disability	Jury Verdict	Plaintiff	Affirmed
28	Cowan v. Strafford R-VI School Dist.	140 F.3d 1153	8th Cir.(Mo.)	Apr 07	1998	Religion	Judgment Following Jury Trial	Plaintiff	Affirmed
29	Davis v. U.S. Postal Service	142 F.3d 1334	10th Cir.(Colo.)	May 06	1998	Sexual Harassment	Judgment As Matter Of Law	Defendant	Reversed in Part
30	Bales v. Wal-Mart Stores, Inc.	143 F.3d 1103	8th Cir.(Iowa)	May 07	1998	Sexual Harassment	Judgment Upon Jury Verdict	Plaintiff	Affirmed
31	Wideman v. Wal-Mart Stores Inc.	141 F.3d 1453	11th Cir.(Fla.)	May 27	1998	Sexual Haassment, Retaliation	Judgment As Matter Of Law	Defendant	Reversed in Part
32	Riemer v. Illinois Dept. of Transp.	148 F.3d 800	7th Cir.(Ill.)	Jun 29	1998	Disability	Judgment Following Jury Trial	Plaintiff	Affirmed
33	Criado v. IBM Corp.	145 F.3d 437	1st Cir.(Puerto	Jun 05	1998	Disability	Judgment Upon Jury Verdict	Plaintiff	Affirmed
34	Kirsch v. Fleet Street Ltd.	148 F.3d 149	2nd Cir.(N.Y.)	Jun 25	1998	Age	Judgment Following Jury Verdict	Plaintiff	Affirmed

U.S. Court Of Appeals

Excluding 5th Circuit

July 23, 2001

	Title	Citation	Circuit	Date	Year	Type Of Discrimination	Type Of Decision	District Court Found For	Decision On Appeal
35	Greaser v. State Dept. of Corrections	145 F.3d 979	8th Cir.(Mo.)	Jun 01	1998	Retaliation	Jury Trial	Defendant	Affirmed
36	Haschmann v. Time Warner Entertainment Co.	151 F.3d 591	7th Cir.(Wis.)	Jul 29	1998	Disability, FMLA	Judgment Following Jury Trial	Plaintiff	Affirmed
37	Roberts v. Roadway Exp. Inc.	149 F.3d 1098	10th Cir.(Colo.)	Jul 02	1998	Race, Retaliation	Judgment Following Jury Trial	Plaintiff	Affirmed
38	Ross v. Rhodes Furniture Inc.	146 F.3d 1286	11th Cir.(Ala.)	Jul 20	1998	Retaliation	Judgment As Matter Of Law	Defendant	Reversed
39	Brennan v. GTE Government Systems Corp.	150 F.3d 21	1st Cir.(Mass.)	Jul 16	1998	Age	Jury (Directed Verdict)	Defendant	Reversed
40	Paolitto v. John Brown E. & C. Inc.	151 F.3d 60	2nd Cir.(Conn.)	Jul 17	1998	Age	Jury Verdict	Plaintiff	Affirmed
41	Smith v. Riceland Foods Inc.	151 F.3d 813	8th Cir.(Ark.)	Aug 05	1998	Gender	Judgment Upon Jury Verdict	Plaintiff	Affirmed
42	Kramer v. Logan County School District No. R-1	157 F.3d 620	8th Cir.(Neb.)	Oct 14	1998	Gender	Judgment Upon Jury Verdict	Plaintiff	Affirmed
43	Lockard v. Pizza Hut Inc.	162 F.3d 1062	10th Cir.(Okla.)	Dec 14	1998	Sexual Harassment	Judgment Upon Jury Verdict	Plaintiff	Affirmed in part
44	Excel Corp. v. Bosley	165 F.3d 635	8th Cir.(Iowa)	Jan 19	1999	Sexual Harassment	Judgment Following Jury Trial	Plaintiff	Affirmed in part
45	Medlock v. Ortho Biotech Inc.	164 F.3d 545	10th Cir.(Kan.)	Jan 05	1999	Retaliation	Judgment Following Jury Trial	Plaintiff	Affirmed
46	McCue v. State of Kansas, Dept of Human Reso	165 F.3d 784	10th Cir.(Kan.)	Jan 07	1999	Sexual Harassment	Judgment Following Jury Trial	Plaintiff	Affirmed
47	Van Steenburgh v. Rival Co.	171 F.3d 1155	8th Cir.(Mo.)	Feb 26	1999	Sexual Harassment	Judgment As Matter Of Law	Defendant	Reversed
48	Ramos v. Davis & Geck Inc.	167 F.3d 727	1st Cir.(Puerto	Feb 18	1999	Age	Judgment Upon Jury Verdict	Plaintiff	Affirmed
49	Brandau v. State of Kansas	168 F.3d 1179	10th Cir.(Kan.)	Feb 16	1999	Sexual Harassment	Jury Verdict	Plaintiff	Affirmed
50	Wilson v. AM General Corp.	167 F.3d 1114	7th Cir.(Ind.)	Feb 04	1999	Age	Judgment Following Jury Trial	Plaintiff	Affirmed
51	Bailey v. Runyon	167 F.3d 466	8th Cir.(Minn.)	Feb 08	1999	Sexual Harassment	Judgment As Matter Of Law	Defendant	Reversed
52	Dudley v. Wal-Mart Stores Inc.	166 F.3d 1317	11th Cir.(Ala.)	Feb 09	1999	Race	Judgment Following Jury Trial	Plaintiff	Affirmed in part
53	Moore v. KUKA Welding Systems & Robot Corp.	171 F.3d 1073	6th Cir.(Mich.)	Mar 26	1999	Race, Sxl Hrssmnt, Cnstrctive Dsc	Judgment Following Jury Trial	Plaintiff	Affirmed
54	Spencer v. Stuart Hall Co. Inc.	173 F.3d 1124	8th Cir.(Mo.)	Apr 12	1999	Age	Judgment Following Jury Trial	Plaintiff	Affirmed
55	Lathem v. Department of Children and Youth Ser	172 F.3d 786	11th Cir.(Ga.)	Apr 14	1999	Sex	Judgment Upon Jury Verdict	Plaintiff	Affirmed
56	Wichmann v. Board of Trustees of Southern Illin	180 F.3d 791	7th Cir.(Ill.)	Jun 07	1999	Age	Judgment Upon Jury Verdict	Plaintiff	Affirmed
57	Swanks v. Washington Metropolitan Area Transit	179 F.3d 929	D.C.Cir.	Jun 18	1999	Disability	Judgment Upon Jury Verdict	Plaintiff	Affirmed
58	Blackmon v. Pinkerton Sec. & Investigative Servi	182 F.3d 629	8th Cir.(Iowa)	Jun 30	1999	Sexual Harassment, Retaliation	Judgment As Matter Of Law	Defendant	Reversed
59	Scott v. County of Ramsey	180 F.3d 913	8th Cir.(Minn.)	Jun 01	1999	Retaliation	Judgment Following Jury Trial	Plaintiff	Affirmed
60	Dhyne v. Meiners Thriftway Inc.	184 F.3d 983	8th Cir.(Mo.)	Jul 21	1999	Sexual Harassment	Judgment Upon Jury Verdict	Plaintiff	Affirmed
61	Kimbrough v. Loma Linda Development Inc.	183 F.3d 782	8th Cir.(Mo.)	Jul 09	1999	Sex, Sexual Harassment	Judgment Following Jury Trial	Plaintiff	Affirmed
62	Muller v. Costello	187 F.3d 298	2nd Cir.(N.Y.)	Aug 11	1999	Retaliation	Jury Verdict	Plaintiff	Affirmed
63	Knowlton v. Teltrust Phones Inc.	189 F.3d 1177	10th Cir.(Utah)	Aug 16	1999	Sexual Harassment	Judgment Following Jury Trial	Plaintiff	Affirmed
64	Beaver v. Rayonier, Inc.	200 F.3d 723	11th Cir.(Ga.)	Sep 13	1999	Age	Judgment Upon Jury Verdict	Plaintiff	Affirmed
65	Pavon v. Swift Transp. Co. Inc.	192 F.3d 902	9th Cir.(Or.)	Sep 20	1999	Race, Retaliatory Discharge	Judgment Following Jury Trial	Plaintiff	Affirmed
66	Beachy v. Boise Cascade Corp.	191 F.3d 1010	9th Cir.(Or.)	Sep 08	1999	Disability	Judgment Upon Jury Verdict	Defendant	Affirmed
67	Curry v. District of Columbia	195 F.3d 654	DC.Cir.	Nov 09	1999	Sexual Harassment	Jury Verdict	Plaintiff	Affirmed
68	Pennington v. Western Atlas Inc	202 F.3d 902	6th Cir.(Ky.)	Feb 07	2000	ERISA	Judgment Following Jury Trial	Plaintiff	Affirmed
69	Ryduchowski v. Port Authority of New York and	203 F.3d 135	2nd Cir.(N.Y.)	Feb 08	2000	Equal Pay	Judgment As Matter Of Law	Defendant	Reversed
70	E.E.O.C. v. EMC Corp. of Massachusetts	205 F.3d 1339	6th Cir.(Mich.)	Feb 08	2000	Gender	Jury Verdict	Plaintiff	Affirmed
71	Mathur v. Board of Trustees of Southern Illinois	207 F.3d 938	7th Cir.(Ill.)	Mar 27	2000	Employment	Judgment As Matter Of Law	Defendant	Reversed
72	Tarshis v. Riese Organization	211 F.3d 30	2nd Cir.(N.Y.)	Apr 26	2000	Age, National Origin	Dismissed	Defendant	Reversed

U.S. Court Of Appeals

Excluding 5th Circuit

July 23, 2001

	Title	Citation	Circuit	Date	Year	Type Of Discrimination	Type Of Decision	District Court Found For	Decision On Appeal
73	Greene v. Safeway Stores Inc	210 F.3d 1237	10th Cir.(Colo.)	Apr 28	2000	Age	Judgment Following Jury Trial	Plaintiff	Affirmed
74	Sharkey v. Lasmo (AUL Ltd.)	214 F.3d 371	2nd Cir.(N.Y.)	Jun 08	2000	Age	Jury Verdict	Plaintiff	Affirmed
75	Ogden v. Wax Works, Inc	214 F.3d 999	8th Cir.(Iowa)	Jun 06	2000	Sexual Harassment, retaliation	Jury Verdict	Plaintiff	Affirmed
75	**Plaintiff Affirmed**								
1	Black v. Zaring Homes Inc.	104 F.3d 822	6th Cir.(Ohio)	Jan 14	1997	Gender	Judgment Upon Jury Verdict	Plaintiff	Reversed
2	Caviness v. Nucor-Yamato Steel Co.	105 F.3d 1216	8th Cir.(Ark.)	Jan 29	1997	Sexual Harassment	Judgment Following Jury Trial	Plaintiff	Reversed
3	Kimzey v. Wal-Mart Stores Inc.	107 F.3d 568	8th Cir.(Mo.)	Feb 20	1997	Gender	Jury Verdict	Plaintiff	Affirmed
4	Feltmann v. Sieben	108 F.3d 970	8th Cir.(Mo.)	Mar 20	1997	Gender	Judgment Upon Jury Verdict	Plaintiff	Reversed
5	Kolstad v. American Dental Ass'n	108 F.3d 1431	D.C.Cir.	Mar 21	1997	Gender	Judgment Upon Jury Verdict	Plaintiff	Affirmed
6	Brandt v. Shop "n" Save Warehouse Foods Inc.	108 F.3d 935	8th Cir.(Mo.)	Mar 17	1997	Gender	Judgment Upon Jury Verdict	Plaintiff	Reversed
7	Grossmann v. Dillard Dept. Stores Inc.	109 F.3d 457	8th Cir.(Ark.)	Mar 24	1997	Age	Judgment Upon Jury Verdict	Plaintiff	Reversed
8	Tribulak v. Minirth-Meier-Rice Clinic	111 F.3d 135	8th Cir.(Ark.)	Apr 15	1997	Employment	Judgment As Matter Of Law	Defendant	Affirmed
9	Newhouse v. McCormick & Co. Inc.	110 F.3d 635	8th Cir.(Neb.)	Apr 14	1997	Age	Jury Verdict	Plaintiff	Reversed
10	Rush v. Scott Specialty Gases Inc.	113 F.3d 476	3rd Cir.(Pa.)	May 14	1997	Gender	Jury Verdict	Plaintiff	Reversed
11	Reynolds v. CSX Transp. Inc.	115 F.3d 860	11th Cir.(Fla.)	Jun 20	1997	Sexual Harassment	Judgment Following Jury Trial	Plaintiff	Reversed
12	Jarvis v. Sauer Sundstrand Co.	116 F.3d 321	8th Cir.(Iowa)	Jun 17	1997	Age	Judgment As Matter Of Law	Defendant	Affirmed
13	Tincher v. Wal-Mart Stores Inc.	118 F.3d 1125	7th Cir.(Ind.)	Jun 20	1997	Religion	Judgment Upon Jury Verdict	Plaintiff	Reversed
14	Mungin v. Katten Muchin & Zavis	116 F.3d 1549	D.C.Cir.	Jul 08	1997	Race	Judgment Upon Jury Verdict	Plaintiff	Reversed
15	Gartman v. Gencorp Inc.	120 F.3d 127	8th Cir.(Ark.)	Jul 16	1997	Gender	Judgment Upon Jury Verdict	Plaintiff	Reversed
16	Willis v. Marion County Auditor's Office	118 F.3d 542	7th Cir.(Ind.)	Jul 01	1997	Retaliation	Judgment As Matter Of Law	Defendant	Affirmed
17	Buchholz v. Rockwell Intern. Corp.	120 F.3d 146	8th Cir.(Iowa)	Jul 23	1997	Age	Judgment Upon Jury Verdict	Defendant	Affirmed
18	Kim v. Nash Finch Co.	123 F.3d 1046	8th Cir.(Iowa)	Aug 20	1997	Race, Color, Age	Judgment Upon Jury Verdict	Plaintiff	Reversed
19	Walden v. Georgia-Pacific Corp.	126 F.3d 506	3rd Cir.(Del.)	Sep 26	1997	Retaliatory Termination	Judgment Upon Jury Verdict	Defendant	Affirmed
20	Pollis v. New School for Social Research	132 F.3d 115	2nd Cir.(N.Y.)	Dec 22	1997	Gender	Judgment Upon Jury Verdict	Plaintiff	Reversed
21	Smith v. Norwest Financial Acceptance Inc.	129 F.3d 1408	10th Cir.(Wyo.)	Dec 03	1997	Sexual Harassment	Judgment Upon Jury Verdict	Plaintiff	Reversed
22	Deneen v. Northwest Airlines Inc.	132 F.3d 431	8th Cir.(Minn.)	Jan 06	1998	Gender	Judgment Upon Jury Verdict	Plaintiff	Reversed
23	E.E.O.C. v. HBE Corp.	135 F.3d 543	8th Cir.(Mo.)	Jan 27	1998	Race	Judgment Upon Jury Verdict	Plaintiff	Reversed
24	DeJarnette v. Corning Inc.	133 F.3d 293	4th Cir.(Va.)	Jan 05	1998	Gender	Jury Verdict	Plaintiff	Reversed
25	Annis v. County of Westchester	136 F.3d 239	2nd Cir.(N.Y.)	Jan 28	1998	Gender	Judgment Upon Jury Verdict	Plaintiff	Reversed
26	Galdieri-Ambrosini v. National Realty & Develop	136 F.3d 276	2nd Cir.(N.Y.)	Feb 04	1998	Gender	Judgment As Matter Of Law	Defendant	Affirmed
27	Hibben v. Nardone	137 F.3d 480	7th Cir.(Wis.)	Feb 20	1998	Gender	Judgment Following Jury Trial	Plaintiff	Reversed
28	Tidwell v. Carter Products	135 F.3d 1422	11th Cir.(Fla.)	Feb 26	1998	Age	Judgment Following Jury Trial	Plaintiff	Reversed
29	Jones v. Bessemer Carraway Medical Center	137 F.3d 1306	11th Cir.(Ala.)	Mar 27	1998	Race	Judgment As Matter Of Law	Defendant	Affirmed
30	Browning v. President Riverboat Casino-Missour	139 F.3d 631	8th Cir.(Mo.)	Mar 20	1998	Race	Judgment Upon Jury Verdict	Plaintiff	Reversed
31	Todd v. Ortho Biotech Inc.	138 F.3d 733	8th Cir.(Minn.)	Mar 05	1998	Gender	Judgment Following Jury Trial	Plaintiff	Reversed
32	Cline v. Wal-Mart Stores Inc.	144 F.3d 294	4th Cir.(Va.)	May 05	1998	FMLA, Disability	Judgment Following Jury Trial	Defendant	Reversed In Part

U.S. Court Of Appeals

Excluding 5th Circuit

July 23, 2001

	Title	Citation	Circuit	Date	Year	Type Of Discrimination	Type Of Decision	District Court Found For	Decision On Appeal
33	Lindale v. Tokheim Corp.	145 F.3d 953	7th Cir.(Ind.)	May 29	1998	Sex	Judgment Upon Jury Verdict	Plaintiff	Reversed
34	Norton v. Sam's Club	145 F.3d 114	2nd Cir.(N.Y.)	May 29	1998	Age	Judgment Upon Jury Verdict	Plaintiff	Reversed
35	Kolstad v. American Dental Ass'n	139 F.3d 958	D.C.Cir.	May 08	1998	Gender	Judgment Following Jury Trial	Plaintiff	Reversed
36	Tuohey v. Chicago Park Dist.	148 F.3d 735	7th Cir.(Ill.)	Jun 19	1998	Pregnancy	Judgment Upon Jury Verdict	Defendant	Affirmed
37	Jones v. Bessemer Carraway Medical Center	151 F.3d 1321	11th Cir.(Ala.)	Aug 24	1998	Race	Judgment As Matter Of Law	Defendant	Affirmed
38	Miller v. Artistic Cleaners	153 F.3d 781	7th Cir.(Ind.)	Aug 27	1998	Age, race, retaliation	Judgment Following Jury Trial	Plaintiff	Reversed
39	Carey v. Mt. Desert Island Hospital	156 F.3d 31	1st Cir.(Mn.)	Aug 18	1998	Gender, Discharge	Judgment Following Jury Trial	Plaintiff	Reversed
40	Alvarez-Fonseca v. Pepsi Cola of Puerto Rico B	152 F.3d 17	1st Cir.(Puerto	Aug 05	1998	Age	Set Aside Jury Verdict, Dismissed	Defendant	Affirmed
41	Bergstrom-Ek v. Best Oil Co.	153 F.3d 851	8th Cir.(Minn.)	Aug 11	1998	Pregnancy, Retaliation	Judgment As Matter Of Law	Defendant	Reversed
42	Watkins v. Sverdrup Technology Inc.	153 F.3d 1308	11th Cir.(Fla.)	Sep 11	1998	Age	Judgment As Matter Of Law	Defendant	Affirmed
43	Gumbhir v. Curators of University of Missouri	157 F.3d 1141	8th Cir.(Mo.)	Oct 07	1998	Retaliation	Judgment Following Jury Trial	Plaintiff	Reversed
44	Colwell v. Suffolk County Police Dept.	158 F.3d 635	2nd Cir.(N.Y.)	Oct 15	1998	Disability	Judgment Following Jury Trial	Plaintiff	Reversed
45	Denesha v. Farmers Ins. Exchange	161 F.3d 491	8th Cir.(Mo.)	Nov 03	1998	Age	Jury Verdict	Plaintiff	Reversed
46	Gibson v. Old Town Trolley Tours of Washington	160 F.3d 177	4th Cir.(Md.)	Nov 12	1998	Retaliation	Judgment Following Jury Trial	Plaintiff	Reversed
47	Berman v. Orkin Exterminating Co. Inc.	160 F.3d 697	11th Cir.(Fla.)	Nov 13	1998	Religion, Retaliation	Judgment A Matter Of Law	Defendant	Reversed
48	Cox v. Dubuque Bank & Trust Co.	163 F.3d 492	8th Cir.(Iowa)	Dec 22	1998	Age	Judgment Upon Jury Verdict	Plaintiff	Reversed
49	Bogle v. Orange County Bd. of County Com'rs	162 F.3d 653	11th Cir.(Fla.)	Dec 09	1998	Age	Judgment As Matter Of Law	Defendant	Affirmed
50	Hamlin v. Charter Tp. of Flint	165 F.3d 426	6th Cir.(Mich.)	Jan 08	1999	Disability	Jury Verdict	Plaintiff	Reversed
51	Workman v. Frito-Lay Inc.	165 F.3d 460	6th Cir.(Tenn.)	Jan 15	1999	Discrimination	Judgment Upon Jury Verdict	Plaintiff	Reversed
52	Anaeme v. Diagnostek, Inc.	164 F.3d 1275	10th Cir.(N.M.)	Jan 06	1999	Race	Judgment Following Jury Trial	Defendant	Affirmed
53	Poindexter v. Atchison Topeka and Santa Fe Rai	168 F.3d 1228	10th Cir.(Kan.)	Feb 24	1999	Disability	Jury Verdict	Plaintiff	Reversed
54	Coffey v. Dobbs Intern. Services Inc.	170 F.3d 323	2nd Cir.(N.Y.)	Mar 15	1999	Retaliation	Jury Verdict	Plaintiff	Reversed
55	Hurley v. Atlantic City Police Dept.	174 F.3d 95	3rd Cir.(N.J.)	Mar 18	1999	Gender	Judgment Upon Jury Verdict	Plaintiff	Reversed
56	Sheehan v. Donlen Corp.	173 F.3d 1039	7th Cir.(Ill.)	Mar 18	1999	Pregnancy	Judgment Upon Jury Verdict	Plaintiff	Reversed
57	Tuttle v. Missouri Dept. of Agriculture	172 F.3d 1025	8th Cir.(Mo.)	Mar 26	1999	Age	Judgment Upon Jury Verdict	Defendant	Affirmed
58	Sullivan v. National R.R. Passenger Corp.	170 F.3d 1056	11th Cir.(Fla.)	Mar 25	1999	Sexual Harassment, Retaliation	Judgment Following Jury Trial	Plaintiff	Reversed
59	Baty v. Willamette Industries Inc.	172 F.3d 1232	10th Cir.(Kan.)	Apr 07	1999	Sexual Hrssmnt, Retaltry Dschrg	Judgment Upon Jury Verdict	Plaintiff	Reversed
60	Kunin v. Sears Roebuck and Co.	175 F.3d 289	3rd Cir.(Pa.)	Apr 28	1999	Sexual Harassment	Judgment Upon Jury Verdict	Plaintiff	Reversed
61	Morse v. Southern Union Co.	174 F.3d 917	8th Cir.(Mo.)	Apr 14	1999	Age	Jury Verdict	Plaintiff	Reversed
62	Lowe v. Consolidated Freightways of Delaware I	177 F.3d 640	7th Cir.(Wis.)	May 06	1999	Race	Jury Verdict	Defendant	Affirmed
63	Clover v. Total System Services Inc.	176 F.3d 1346	11th Cir.(Ga.)	May 27	1999	Sexual Harssmnt, Retalitry Dschg	Jury Verdict	Plaintiff	Reversed
64	Forshee v. Waterloo Industries Inc.	178 F.3d 527	8th Cir.(Ark.)	May 27	1999	Sex	Judgment Upon Jury Verdict	Plaintiff	Reversed
65	Koster v. Trans World Airlines Inc.	181 F.3d 24	1st Cir.(Mass.)	Jun 21	1999	Age	Judgment Upon Jury Verdict	Plaintiff	Reversed
66	Buckles v. First Data Resources Inc.	176 F.3d 1098	8th Cir.(Neb.)	Jun 02	1999	Disability	Judgment Following Jury Trial	Plaintiff	Reversed
67	Brillhart v. Philips Electronics North America Cor	179 F.3d 1271	10th Cir.(N.M.)	Jun 14	1999	Retaliatory Discharge	Judgment As Matter Of Law	Plaintiff	Reversed
68	Barbour v. Browner	181 F.3d 1342	D.C.Cir.	Jul 13	1999	Race, Sexual Harassment	Judgment Upon Jury Verdict	Plaintiff	Reversed
69	Stimpson v. City of Tuscaloosa	186 F.3d 1328	11th Cir.(Ala.)	Aug 30	1999	Sex	Judgment Upon Jury Verdict	Plaintiff	Reversed
70	Cannice v. Norwest Bank Iowa N.A.	189 F.3d 723	8th Cir.(Iowa)	Aug 13	1999	Disability Harassment	Judgment Upon Jury Verdict	Plaintiff	Reversed

U.S. Court Of Appeals

Excluding 5th Circuit

July 23, 2001

	Title	Citation	Circuit	Date	Year	Type Of Discrimination	Type Of Decision	District Court Found For	Decision On Appeal
71	Scamardo v. Scott County	189 F.3d 707	8th Cir.(Ark.)	Aug 25	1999	Retaliation	Judgment Upon Jury Verdict	Plaintiff	Reversed
72	Pivirotto v. Innovative Systems Inc.	191 F.3d 344	3rd Cir.(Pa.)	Sep 07	1999	Gender	Judgment After Jury Trial	Defendant	Affirmed
73	Smith v. Cashland Inc.	193 F.3d 1158	10th Cir.(Okla.)	Oct 07	1999	Sexual Harassment	Judgment Following Jury Trial	Plaintiff	Reversed
74	Thorne v. Welk Inv., Inc.	197 F.3d 1205	8th Cir.(Mo.)	Nov 22	1999	Sexual Harassment, Retaliation	Judgment Following Jury Trial	Plaintiff	Reversed
75	Belk v. Southwestern Bell Telephone Co.	194 F.3d 946	8th Cir.(Ark.)	Nov 09	1999	Disability	Judgment Following Jury Trial	Plaintiff	Vacated
76	Farley v. Nationwide Mutual Insurance Company	197 F.3d 1322	11th Cir.(Fla.)	Dec 14	1999	Age, disability	Judgment Following Jury Trial	Plaintiff	Reversed
77	McCarthy v. New York City Tech Coll of UNY	202 F.3d 161	2nd Cir.(N.Y.)	Jan 13	2000	Age	Judgment As Matter Of Law	Defendant	Affirmed
78	Frazier v. Iowa Beef Processors Inc	200 F.3d 1190	8th Cir.(Iowa)	Jan 19	2000	FMLA, retaliatory dischage	Judgment As Matter Of Law	Defendant	Affirmed
79	McGill v. Munoz	203 F.3d 843	D.C.Cir.	Feb 18	2000	Disability	Judgment Upon Jury Verdict	Plaintiff	Reversed
80	Sauzek v. Exxon Coal USA Inc	202 F.3d 913	7th Cir.(Ill.)	Feb 02	2000	Age, retaliatory discharge	Judgment Following Jury Trial	Defendant	Affirmed
81	Passantino v. Johnson & Johnson Consumer Pr	212 F.3d 493	9th Cir.(Wash.)	Mar 10	2000	Sex, retaliation	Jury Verdict	Plaintiff	Reversed
82	Alexander v. Fulton County Ga.	207 F.3d 1303	11th Cir.(Ga.)	Mar 30	2000	Race	Judgment Upon Jury Verdict	Plaintiff	Reversed
83	Gupta v. Florida Bd. of Regents	212 F.3d 571	11th Cir.(Fla.)	May 17	2000	Gender	Judgment Upon Jury Verdict	Plaintiff	Reversed
84	Gile v. United Airlines Inc	213 F.3d 365	7th Cir.(Ill.)	May 22	2000	Disability	Judgment Following Jury Trial	Plaintiff	Reversed
84	Plaintiff Reversed								

159	Total Cases Before Reeves	Plaintiff Affirmed:	75	47.2%
		Plaintiff Reversed:	84	52.8%

After Reeves v. Sanderson Plumbing Products, Inc.

1	Pals v. Schepel Buick & GMC Truck, Inc	220 F.3d 495	7th Cir.(Ind.)	Jul 14	2000	Disability	Judgment Upon Jury Verdict	Plaintiff	Affirmed
2	Kovacevich v. Kent State University	224 F.3d 806	6th Cir.(Ohio)	Aug 25	2000	Age, Race	Jury Verdict	Plaintiff	Affirmed
3	Williams v. City of Kansas City MO	223 F.3d 749	8th Cir.(Mo.)	Aug 16	2000	Hostile working environment	Judgment Upon Jury Verdict	Plaintiff	Affirmed
4	Jackson v. City of St. Louis	220 F.3d 894	8th Cir.(Mo.)	Aug 11	2000	Race	Judgment Upon Jury Verdict	Plaintiff	Affirmed
5	Belk v. City of Eldon	228 F.3d 872	8th Cir.(Mo.)	Oct 02	2000	First Amendment	Judgment Following Jury Trial	Plaintiff	Affirmed
6	Ross v. Douglas County Nebraska	234 F.3d 391	8th Cir.(Neb.)	Dec 11	2000	Racial harassment, retaliation	Judgment Upon Jury Verdict	Plaintiff	Affirmed
7	Gentry v. Export Packaging Co	238 F.3d 842	7th Cir.(Ill.)	Jan 25	2001	Sexual Harassment	Judgment Following Jury Trial	Plaintiff	Affirmed
8	Broadus v. O.K. Industries, Inc	238 F.3d 990	8th Cir.(Ark.)	Jan 23	2001	Retaliation	Judgment Following Jury Trial	Plaintiff	Affirmed
9	O'Neal v. Ferguson Const. Co	237 F.3d 1248	10th Cir.(N.M.)	Jan 24	2001	Race, Retaliation	Judgment Following Jury Trial	Plaintiff	Affirmed
10	Lavin McEleney v. Marist College	239 F.3d 476	2nd Cir.(N.Y.)	Feb 02	2001	Gender	Judgment Upon Jury Verdict	Plaintiff	Affirmed
11	Bruso v. United Airlines Inc	239 F.3d 848	7th Cir.(Ill.)	Feb 02	2001	Retaliatory Demotion	Judgment Upon Jury Verdict	Plaintiff	Affirmed
12	Tolbert v. Queens College	242 F.3d 58	2nd Cir.(N.Y.)	Feb 22	2001	Race	Jury Verdict Set Aside	Defendant	Reversed
13	Tullis v. Townley Engineering & Mfg Co	243 F.3d 1058	7th Cir.(Ill.)	Mar 16	2001	Retaliatory Discharge	Judgment Upon Jury Verdict	Plaintiff	Affirmed

U.S. Court Of Appeals

Excluding 5th Circuit

July 23, 2001

	Title	Citation	Circuit	Date	Year	Type Of Discrimination	Type Of Decision	District Court Found For	Decision On Appeal
14	Clockedile v. New Hampshire Dept of Correction	245 F.3d 1	1st Cir.(N.H.)	Mar 20	2001	Sexual Harassment, retaliation	Judge set aside Jury verdict	Defendant	Reversed
15	Moring v. Arkansas Dept of Correction	243 F.3d 452	8th Cir.(Ark.)	Mar 15	2001	Sexual Harassment	Jury Verdict	Plaintiff	Affirmed
16	Quint v. A E Staley Mfg Company	246 F.3d 11	1st Cir.(Mn.)	Apr 11	2001	Disability	Jury Verdict	Plaintiff	Affirmed
17	Zimmerman v. Associates First Capital Corp	251 F.3d 376	2nd Cir.(N.Y.)	May 31	2001	Age, Sex, Retaliation	Judgment Upon Jury Verdict	Plaintiff	Affirmed
17	Plaintiff Affirmed								
1	Phillips v. Union Pacific R. Co.	216 F.3d 703	8th Cir.(Ark.)	Jun 26	2000	Disability	Judgment As Matter Of Law	Defendant	Affirmed
2	DiSanto v. McGraw-Hill, Inc./Platt's Div	220 F.3d 61	2nd Cir.(N.Y.)	Jul 11	2000	Disability, discriminatiory discharge	Judgment As Matter Of Law	Defendant	Affirmed
3	Smith v. Leggett Wire Co.	220 F.3d 752	6th Cir.(Ky.)	Jul 17	2000	Race	Judgment Upon Jury Verdict	Plaintiff	Reversed
4	Tatom v. Georgia-Pacific Corp.	228 F.3d 926	8th Cir.(Ark.)	Oct 10	2000	Age	Jury Verdict	Plaintiff	Reversed
5	Ballard v. Muskogee Regional Medical Center	238 F.3d 1250	10th Cir.(Okla.)	Jan 29	2001	First Amendment	Judgment Upon Jury Verdict	Plaintiff	Reversed
6	Lack v. Wal-Mart Stores Inc	240 F.3d 255	4th Cir.(W.V)	Feb 13	2001	Sexual Harassment	Judgment Upon Jury Verdict	Plaintiff	Reversed
7	Roh v. Lakeshore Estates Inc	241 F.3d 491	6th Cir.(Tenn.)	Feb 26	2001	Religion	Judgment Upon Jury Verdict	Plaintiff	Reversed
8	Davis v. Town Of Lake Park Florida	245 F.3d 1232	11th Cir.(Fla.)	Mar 26	2001	Race	Judgment As Matter Of Law	Defendant	Affirmed
9	Duncan v. Washington Metro Area Transit Autho	240 F.3d 1110	D.C.Cir.	Mar 02	2001	Disability	Judgment Upon Jury Verdict	Plaintiff	Reversed
10	Kiphart v. Saturn Corporation	251 F.3d 573	6th Cir.(Tenn.)	May 31	2001	Disability	Judgment As Matter Of Law	Defendant	Reversed
11	Cooke v. Stefani Managment Services Inc	250 F.3d 564	7th Cir.(Ill.)	May 14	2001	Sexual Harassment	Judgment Upon Jury Verdict	Plaintiff	Reversed
12	Leibovitz v. NY City Transit Authority	252 F.3d 179	2nd Cir.(N.Y.)	Jun 06	2001	Sexual Harassment	Judgment Upon Jury Verdict	Plaintiff	Reversed
12	Plaintiff Reversed								

29	Total Cases After Reeves	Plaintiff Affirmed:	17	58.6%
		Plaintiff Reversed:	12	41.4%

188	**Total Cases Reviewed**	**Plaintiff Affirmed**	**92**	**48.9%**
		Plaintiff Reversed	**96**	**51.1%**

5th Circuit Court Of Appeals

Criminal Cases

July 19, 2001

Year	Number Of Cases Reviewed	Action On Grounds Of Sufficiency Of The Evidence			
		Affirmed		Reversed	
1997	48	39	81%	9	19%
1998	33	29	88%	4	12%
1999	35	33	94%	2	6%
2000	20	19	95%	1	5%
2001	15	15	100%	0	0%
1997-2001	**151**	**135**	**89%**	**16**	**11%**

5th Circuit Court Of Appeals

Criminal Cases

July 19, 2001

	Name Of Case	Citation	Circuit		Date	Year	Type Of Case	Affirmed / Reversed
1997								
1	U.S. v. Asibor	109 F.3d 1023	5th Cir.(Miss.)	03	Mar 27	1997	Drugs	Affirmed
2	U.S. v. Bailey	111 F.3d 1229	5th Cir.(Tex.)	04	Apr 25	1997	Burglary	Affirmed
3	U.S. v. Blocker	104 F.3d 720	5th Cir.(Miss.)	01	Jan 16	1997	Mail/Bank Fraud	Affirmed
4	U.S. v. Bradfield	113 F.3d 515	5th Cir.(Miss.)	05	May 14	1997	Drugs	Affirmed
5	U.S. v. Burton	126 F.3d 666	5th Cir.(Tex.)	10	Oct 17	1997	Robbery	Affirmed
6	U.S. v. Calle	120 F.3d 43	5th Cir.(Tex.)	08	Aug 06	1997	Drugs	Affirmed
7	U.S. v. Cisneros	112 F.3d 1272	5th Cir.(Tex.)	05	May 13	1997	Drugs, Money Laundering	Affirmed
8	U.S. v. Collazo	117 F.3d 793	5th Cir.(Tex.)	07	Jul 09	1997	DUI	Affirmed
9	U.S. v. Dixon	132 F.3d 192	5th Cir.(Miss.)	12	Dec 29	1997	Drug trafficking	Affirmed
10	U.S. v. Dupre	117 F.3d 810	5th Cir.(La.)	07	Jul 11	1997	Conspiracy, Bank Fraud, Money Laundering	Affirmed
11	U.S. v. Fletcher	121 F.3d 187	5th Cir.(Tex.)	08	Aug 25	1997	Bank robbery	Affirmed
12	U.S. v. Gonzales	121 F.3d 928	5th Cir.(Tex.)	08	Aug 26	1997	Drugs	Affirmed
13	U.S. v. Gray	105 F.3d 956	5th Cir.(Tex.)	01	Jan 29	1997	Mail Fraud/Conspiracy	Affirmed
14	U.S. v. Griffith	118 F.3d 318	5th Cir.(La.)	07	Jul 17	1997	Drugs	Affirmed
15	U.S. v. Harlan	130 F.3d 1152	5th Cir.(Tex.)	12	Dec 30	1997	Drugs	Affirmed
16	U.S. v. Harris	104 F.3d 1465	5th Cir.(Tex.)	01	Jan 22	1997	Bank Robbery	Affirmed
17	U.S. v. Harvard	103 F.3d 412	5th Cir.(Tex.)	01	Jan 07	1997	Conspiracy/Bank Fraud	Affirmed
18	U.S. v. Hebert	131 F.3d 514	5th Cir.(Tex.)	12	Dec 15	1997	Bank Robbery	Affirmed
19	U.S. v. Humphrey	104 F.3d 65	5th Cir.(Tex.)	01	Jan 13	1997	Mail/Wire Fraud	Affirmed
20	U.S. v. Millet	123 F.3d 268	5th Cir.(La.)	09	Sep 15	1997	Money Laundering	Affirmed
21	U.S. v. Morgan	117 F.3d 849	5th Cir.(Tex.)	07	Jul 15	1997	Drugs	Affirmed
22	U.S. v. Moser	123 F.3d 813	5th Cir.(Tex.)	09	Sep 18	1997	Conspiracy/Mail Fraud	Affirmed
23	U.S. v. Mulderig	120 F.3d 534	5th Cir.(La.)	08	Aug 15	1997	Misapplication of bank funds	Affirmed
24	U.S. v. Pankhurst	118 F.3d 345	5th Cir.(Tex.)	07	Jul 21	1997	Bribery of public official	Affirmed
25	U.S. v. Pena-Rodriguez	110 F.3d 1120	5th Cir.(Tex.)	04	Apr 10	1997	Drugs, Money Laundering	Affirmed
26	U.S. v. Rasco	123 F.3d 222	5th Cir.(La.)	09	Sep 12	1997	armed bank robbery, carrying & using firearm during crime	Affirmed
27	U.S. v. Rodriguez	132 F.3d 208	5th Cir.(Tex.)	12	Dec 31	1997	Willful sale of firearms without license	Affirmed
28	U.S. v. Rogers	126 F.3d 655	5th Cir.(La.)	10	Oct 17	1997	Bank Robbery	Affirmed
29	U.S. v. Salvatore	110 F.3d 1131	5th Cir.(La.)	04	Apr 14	1997	Mail/Wire Fraud	Affirmed
30	U.S. v. Sidhu	130 F.3d 644	5th Cir.(Tex.)	12	Dec 03	1997	Conspiracy to commit mail fraud	Affirmed
31	U.S. v. Soto-Silva	129 F.3d 340	5th Cir.(Tex.)	11	Nov 12	1997	Drugs	Affirmed

5th Circuit Court Of Appeals

Criminal Cases

App. 38

July 19, 2001

	Name Of Case	Citation	Circuit		Date	Year	Type Of Case	Affirmed / Reversed
32	U.S. v. Stevenson	126 F.3d 662	5th Cir.(Miss.)	10	Oct 17	1997	Threatening to assault a federal officer	Affirmed
33	U.S. v. Tencer	107 F.3d 1120	5th Cir.(La.)	03	Mar 10	1997	Mail Fraud/Money Laundering	Affirmed
34	U.S. v. Thomas	120 F.3d 564	5th Cir.(Tex.)	08	Aug 19	1997	Drugs	Affirmed
35	U.S. v. Thompson	130 F.3d 676	5th Cir.(Tex.)	12	Dec 04	1997	Using mails, soliciting, attempting to commit murder of federal judge	Affirmed
36	U.S. v. Torres	114 F.3d 520	5th Cir.(Tex.)	06	Jun 02	1997	Drugs	Affirmed
37	U.S. v. Vaccaro	115 F.3d 1211	5th Cir.(Miss.)	06	Jun 11	1997	Racketeering, Wire Fraud	Affirmed
38	U.S. v. Westbrook	119 F.3d 1176	5th Cir.(Tex.)	08	Aug 05	1997	Drug possession with intent to distribute, money laundering	Affirmed
39	U.S. v. Wilson	116 F.3d 1066	5th Cir.(La.)	06	Jun 26	1997	Drugs, racketeering	Affirmed
39	Affirmed Cases							
1	U.S. v. Garza	118 F.3d 278	5th Cir.(Tex.)	07	Jul 16	1997	Money Laundering	Reversed
2	U.S. v. Grossman	117 F.3d 255	5th Cir.(Tex.)	07	Jul 08	1997	Wire Fraud	Reversed
3	U.S. v. Hunt	129 F.3d 739	5th Cir.(Tex.)	11	Nov 17	1997	Intent to Distribute Drugs	Reversed
4	U.S. v. Knox	112 F.3d 802	5th Cir.(Tex.)	05	May 01	1997	Using or Carrying Firearm	Reversed
5	U.S. v. McPhail	112 F.3d 197	5th Cir.(Miss.)	05	May 12	1997	Carrying firearm in relation to drug trafficking crime	Reversed
6	U.S. v. Pipkin	114 F.3d 528	5th Cir.(Tex.)	07	Jun 02	1997	Structuring money transaction to avoid rprting requirements	Reversed
7	U.S. v. Polk	118 F.3d 286	5th Cir.(Tex.)	06	Jul 17	1997	Carrying firearm during crime/aiding & abetting purchase of firearm	Reversed in Part
8	U.S. v. Sultan	115 F.3d 321	5th Cir.(Tex.)	06	Jun 10	1997	Counterfeit Trafficking	Reversed
9	U.S. v. Thompson	122 F.3d 304	5th Cir.(La.)	09	Sep 23	1997	Using & carrying firearms during drug trafficking offense	Reversed
9	Reversed Cases							
48	**1997 Criminal Cases Reviewed**						**81.3% Affirmed on Sufficiency Of The Evidence**	
							18.8% Reversed on Sufficiency Of The Evidence	
1998								
1	U.S. v. Abrego	141 F.3d 142	5th Cir.(Tex.)	05	May 06	1998	Drug poss w intent to distrib, money laundering, criminal enterprise	Affirmed
2	U.S. v. Brito	136 F.3d 397	5th Cir.(Tex.)	02	Feb 27	1998	Drug conspiracy via importation and distribution enterprise	Affirmed
3	U.S. v. Burns	162 F.3d 840	5th Cir.(Tex.)	12	Dec 09	1998	Fraud	Affirmed
4	U.S. v. Cihak	137 F.3d 252	5th Cir.(Tex.)	03	Mar 13	1998	Bank fraud, wire fraud, obstructing justice	Affirmed
5	U.S. v. Clark	139 F.3d 485	5th Cir.(Tex.)	04	Apr 17	1998	Conspiracy to defraud the US Gov't	Affirmed
6	U.S. v. Cluck	143 F.3d 174	5th Cir.(Tex.)	06	Jun 03	1998	Bankruptcy fraud	Affirmed
7	U.S. v. Cortinas	142 F.3d 242	5th Cir.(Tex.)	05	May 22	1998	Conspiracy, etc, arising out of drug distribution enterprise	Affirmed

5th Circuit Court Of Appeals

Criminal Cases

App. 39

July 19, 2001

	Name Of Case	Citation	Circuit		Date	Year	Type Of Case	Affirmed / Reversed
8	U.S. v. Dukes	139 F.3d 469	5th Cir.(Tex.)	04	Apr 16	1998	Various narcotics offenses	Affirmed
9	U.S. v. Dyer	136 F.3d 417	5th Cir.(La.)	02	Feb 27	1998	Mail Fraud	Affirmed
10	U.S. v. Franklin	148 F.3d 451	5th Cir.(La.)	07	Jul 22	1998	Distribution and conspiring to distribute drugs	Affirmed
11	U.S. v. Gonzalez	163 F.3d 255	5th Cir.(Tex.)	12	Dec 16	1998	Drugs	Affirmed
12	U.S. v. Greer	137 F.3d 247	5th Cir.(Tex.)	03	Mar 11	1998	Embezzlement	Affirmed
13	U.S. v. Hass	150 F.3d 443	5th Cir.(Tex.)	08	Aug 05	1998	Conspiring to mfg and distribute drugs	Affirmed
14	U.S. v. Hemmingson	157 F.3d 347	5th Cir.(La.)	09	Sep 30	1998	Interstate transport of stolen property, money laundering, etc	Affirmed
15	U.S. v. Jones	133 F.3d 358	5th Cir.(Tex.)	01	Jan 20	1998	Drug possession with intent to distribute, poss of firearm/ammo	Affirmed
16	U.S. v. Kelly	140 F.3d 596	5th Cir.(La.)	04	Apr 29	1998	Drug related offenses	Affirmed
17	U.S. v. Mankins	135 F.3d 946	5th Cir.(Tex.)	02	Feb 18	1998	Conspiracy to possess with intent to distribute drugs	Affirmed
18	U.S. v. Mann	161 F.3d 840	5th Cir.(Tex.)	11	Nov 23	1998	Conspiracy, aiding and abetting	Affirmed
19	U.S. v. Martinez	151 F.3d 384	5th Cir.(Tex.)	08	Aug 18	1998	Drug trafficking conspiracy	Affirmed
20	U.S. v. Medina	161 F.3d 867	5th Cir.(Tex.)	11	Nov 23	1998	Drug possession with intent to distribute	Affirmed
21	U.S. v. Munoz	150 F.3d 401	5th Cir.(Tex.)	08	Aug 04	1998	Felon in possession of a firearm	Affirmed
22	U.S. v. Parker	133 F.3d 322	5th Cir.(La.)	01	Jan 15	1998	Public bribery/conspiracy to commit public bribery	Affirmed
23	U.S. v. Pierson	139 F.3d 501	5th Cir.(Tex.)	04	Apr 17	1998	Mailing destructive device with intent to kill or injure	Affirmed
24	U.S. v. Polasek	162 F.3d 878	5th Cir.(Tex.)	12	Dec 11	1998	Conspiracy, mail fraud, false statements, uttering forgery	Reversed
25	U.S. v. Posada-Rios	158 F.3d 832	5th Cir.(Tex.)	10	Oct 21	1998	Drug trafficking	Affirmed
26	U.S. v. Ramirez	145 F.3d 345	5th Cir.(Tex.)	06	Jun 29	1998	Drug possession with intent to distribute	Affirmed
27	U.S. v. Truesdale	152 F.3d 443	5th Cir.(Tex.)	08	Aug 24	1998	Gambling	Reversed
28	U.S. v. Walker	148 F.3d 518	5th Cir.(Miss.)	07	Jul 28	1998	Suborning perjury and making false statements while under oath	Affirmed
29	U.S. v. Williams	132 F.3d 1055	5th Cir.(Tex.)	01	Jan 09	1998	Transporting illegal aliens	Affirmed
29	Affirmed Cases							
1	U.S. v. Beckner	134 F.3d 714	5th Cir.(La.)	02	Feb 02	1998	Wire Fraud, perjury	Reversed
2	U.S. v. Ortega Reyna	148 F.3d 540	5th Cir.(Tex.)	07	Jul 28	1998	Drug possession with intent to distribute	Reversed
3	U.S. v. Stewart	145 F.3d 273	5th Cir.(Tex.)	06	Jun 25	1998	Drug possession with intent to distribute	Reversed
4	U.S. v. Miller	146 F.3d 274	5th Cir.(Tex.)	07	Jul 13	1998	Drug possession with intent to distribute	Vacated
4								

33 1998 Cases Reviewed

87.9% Affirmed on Sufficiency Of The Evidence

12.1% Reversed on Sufficiency Of The Evidence

5th Circuit Court Of Appeals

Criminal Cases

App. 40

July 19, 2001

	Name Of Case	Citation	Circuit		Date	Year	Type Of Case	Affirmed / Reversed
1999								
1	U.S. v. Anderson	174 F.3d 515	5th Cir.(Tex.)	05	Apr 26	1999	Conspiracy, aiding & abetting, bank fraud	Affirmed
2	U.S. v. Brown	186 F.3d 661	5th Cir.(La.)	08	Aug 24	1999	Mail fraud, money laundering	Affirmed
3	U.S. v. Cano-Guel	167 F.3d 900	5th Cir.(Tex.)	02	Feb 12	1999	Drugs	Affirmed
4	U.S. v. Causey	185 F.3d 407	5th Cir.(La.)	08	Aug 16	1999	Conspiracy against civil rights, deprivation of civil rights	Affirmed
5	U.S. v. Cisneros	194 F.3d 626	5th Cir.(Tex.)	10	Oct 28	1999	Murder - for - hire	Affirmed
6	U.S. v. Cornett	195 F.3d 776	5th Cir.(Tex.)	11	Nov 10	1999	Drug possession with intent to distribute	Affirmed
7	U.S. v. Cyprian	197 F.3d 736	5th Cir.(La.)	12	Dec 03	1999	Drug possession with intent to distribute	Affirmed
8	U.S. v. De La Rosa	171 F.3d 215	5th Cir.(Tex.)	03	Mar 24	1999	Aiding & abetting the influence of a juror	Affirmed
9	U.S. v. De Leon	170 F.3d 494	5th Cir.(Tex.)	03	Mar 17	1999	Possession of ammunition by a convicted felon	Affirmed
10	U.S. v. Doke	171 F.3d 240	5th Cir.(Tex.)	03	Mar 25	1999	Conspiracy, bank fraud, making false statements	Affirmed
11	U.S. v. Freeman	164 F.3d 243	5th Cir.(Tex.)	01	Jan 05	1999	Drugs	Affirmed
12	U.S. v. Gallardo-Trapero	185 F.3d 307	5th Cir.(Tex.)	08	Aug 11	1999	Drug possession with intent to distribute	Affirmed
13	U.S. v. Gieger	190 F.3d 661	5th Cir.(Miss.)	09	Sep 24	1999	Conspiracy to submit false Medicare claims	Affirmed
14	U.S. v. Gourley	168 F.3d 165	5th Cir.(Tex.)	02	Feb 19	1999	Drugs	Affirmed
15	U.S. v. Green	180 F.3d 216	5th Cir.(La.)	01	Jun 30	1999	Harboring a fugitive, drug trafficking conspiracy	Affirmed
16	U.S. v. Guerrero	169 F.3d 933	5th Cir.(Tex.)	03	Mar 10	1999	(2) Bank Robbery	Affirmed
17	U.S. v. Haas	171 F.3d 259	5th Cir.(Tex.)	03	Mar 29	1999	Conspiracy to defraud gov't, drugs	Affirmed
18	U.S. v. Hammond	201 F.3d 346	5th Cir.(Tex.)	12	Dec 08	1999	Embezzlement	Affirmed
19	U.S. v. Jones	185 F.3d 459	5th Cir.(La.)	08	Aug 17	1999	Drug possession with intent to distribute	Affirmed
20	U.S. v. Kates	174 F.3d 580	5th Cir.(Tex.)	05	May 03	1999	Drug possession with intent to distribute	Affirmed
21	U.S. v. Lage	183 F.3d 374	5th Cir.(Tex.)	07	Jul 29	1999	Conspiracy & theft of an interstate shipment	Affirmed
22	U.S. v. Marek	198 F.3d 532	5th Cir.(Tex.)	12	Dec 15	1999	Use of interstate commerce facilities in murder-for-hire scheme	Affirmed
23	U.S. v. Martinez	190 F.3d 673	5th Cir.(Tex.)	09	Sep 28	1999	Conspiracy and possession with intent to distribute drugs	Affirmed
24	U.S. v. Monroe	178 F.3d 304	5th Cir.(Tex.)	01	Jun 07	1999	Arson	Affirmed
25	U.S. v. Moreno	185 F.3d 465	5th Cir.(Tex.)	08	Aug 17	1999	Drug possession with intent to distribute	Affirmed
26	U.S. v. Morrow	177 F.3d 272	5th Cir.(Tex.)	05	May 25	1999	Conspiracy, aiding & abetting, bank fraud	Affirmed
27	U.S. v. Powers	168 F.3d 741	5th Cir.(Tex.)	02	Feb 25	1999	Wire Fraud	Affirmed
28	U.S. v. Ramos-Garcia	184 F.3d 463	5th Cir.(Tex.)	08	Aug 06	1999	Drug possession	Affirmed
29	U.S. v. Reissig	186 F.3d 617	5th Cir.(Tex.)	08	Aug 19	1999	Fraudulent telemarketing scheme	Affirmed
30	U.S. v. Short	181 F.3d 620	5th Cir.(La.)	07	Jul 15	1999	Drugs and murder	Affirmed

5th Circuit Court Of Appeals

Criminal Cases

July 19, 2001

	Name Of Case	Citation	Circuit		Date	Year	Type Of Case	Affirmed / Reversed
31	U.S. v. Soape	169 F.3d 257	5th Cir.(Tex.)	03	Mar 09	1999	Counterfeiting Conspiracy	Affirmed
32	U.S. v. Villegas-Rodriguez	171 F.3d 224	5th Cir.(Tex.)	03	Mar 24	1999	Drugs	Affirmed
33	U.S. v. Wyly	193 F.3d 289	5th Cir.(La.)	10	Oct 13	1999	Mail fraud, money laundering, conspiracy	Affirmed
33	Affirmed Cases							
1	U.S. v. Adams	174 F.3d 571	5th Cir.(La.)	05	May 03	1999	Baiting dove fields, aiding & abetting others	Reversed
2	U.S. v. Reveles	190 F.3d 678	5th Cir.(Tex.)	09	Sep 28	1999	(2) Controlled substance possession with intent to distribute	Reversed
2	Reversed Cases							

35 1999 Criminal Cases Reviewed

94.3% Affirmed on Sufficiency Of The Evidence

5.7% Reversed on Sufficiency Of The Evidence

2000

1	U.S. v. Brown	217 F.3d 247	5th Cir.(Tex.)	06	Jun 26	2000	Drug trafficking conspiracy	Affirmed
2	U.S. v. Ceballos-Torres	218 F.3d 409	5th Cir.(Tex.)	07	Jul 06	2000	Possession of firearm in furtherance of drug trafficking	Affirmed
3	U.S. v. Cisneros	203 F.3d 333	5th Cir.(Tex.)	02	Feb 03	2000	Murder - for - hire	Affirmed
4	U.S. v. Edwards	231 F.3d 933	5th Cir.(Miss.)	10	Oct 26	2000	Carjacking and use of a firearm during crime of violence	Affirmed
5	U.S. v. Ferguson	211 F.3d 878	5th Cir.(Tex.)	05	May 04	2000	Bank robbery and felon possession of firearm	Affirmed
6	U.S. v. Guerrero	234 F.3d 259	5th Cir.(Tex.)	11	Nov 22	2000	False statement on ATF form in attempted acq of firearm	Affirmed
7	U.S. v. Lee	217 F.3d 284	5th Cir.(Miss.)	06	Jun 26	2000	Hunting game birds over baited field/aiding and abetting others	Affirmed
8	U.S. v. Mendoza	226 F.3d 340	5th Cir.(Tex.)	08	Aug 29	2000	Conspiracy to possess drugs with intent to distribute	Affirmed
9	U.S. v. Meshack	225 F.3d 556	5th Cir.(Tex.)	08	Aug 28	2000	Various drug-related offenses	Affirmed
10	U.S. v. Montgomery	210 F.3d 446	5th Cir.(Tex.)	04	Apr 19	2000	Drug possession with intent to distribute	Affirmed
11	U.S. v. Phillips	219 F.3d 404	5th Cir.(La.)	07	Jul 13	2000	Theft, money laundering, conspiracy and perjury	Affirmed
12	U.S. v. Ramirez	233 F.3d 318	5th Cir.(Tex.)	11	Nov 09	2000	Forcibly assaulting federal officer	Affirmed
13	U.S. v. Romero-Cruz	201 F.3d 374	5th Cir.(Tex.)	01	Jan 12	2000	Transporting illegal aliens	Affirmed
14	U.S. v. Smith	203 F.3d 884	5th Cir.(Tex.)	02	Feb 14	2000	Bank Robbery	Affirmed
15	U.S. v. Sprick	233 F.3d 845	5th Cir.(Tex.)	11	Nov 14	2000	Mail fraud, money laundering	Affirmed
16	U.S. v. Villasenor	236 F.3d 220	5th Cir.(Tex.)	12	Dec 19	2000	Possession of photos involving sexual exploitation of minors	Affirmed
17	U.S. v. White	219 F.3d 442	5th Cir.(Tex.)	07	Jul 17	2000	Conspiracy to distribute and possession with intent to distribute drugs	Affirmed
18	U.S. v. Wise	221 F.3d 140	5th Cir.(Tex.)	07	Jul 31	2000	Threatening to use a weapon of mass destruction	Affirmed

5th Circuit Court Of Appeals

App. 42

Criminal Cases

July 19, 2001

	Name Of Case	Citation	Circuit		Date	Year	Type Of Case	Affirmed / Reversed
19	U.S. v. Wright	211 F.3d 233	5th Cir.(Tex.)	04	Apr 27	2000	Conspiracy to defraud gov't, tax evasion	Affirmed
19	**Affirmed Cases**							
1	U.S. v. Henriques	234 F.3d 263	5th Cir.(Miss.)	11	Nov 27	2000	Possession of matters w/visuals of minors porn/interstate commerce	Reversed
1	**Reversed Case**							
20	**2000 Criminal Cases Reviewed**						**95.0% Affirmed on Sufficiency Of The Evidence**	
							5.0% Reversed on Sufficiency Of The Evidence	
2001								
1	U.S. v. Berrios-Centeno	250 F.3d 294	5th Cir.(Tex.)	04	Apr 27	2001	Illegal alien unlawfully present in US	Affirmed
2	U.S. v. Daniels	2001 WL 536927	5th Cir.(Tex.)	05	May 21	2001	Bank robbery, money laundering	Affirmed
3	U.S. v. DeLeon	247 F.3d 593	5th Cir.(Tex.)	04	Apr 09	2001	Drug possession with intent to distribute	Affirmed
4	U.S. v. Delgado	2001 WL 716951	5th Cir.(Tex.)	06	Jun 26	2001	Drug possession with intent to distribute, money laundering	Affirmed
5	U.S. v. Dien Duc Huynh	246 F.3d 734	5th Cir.(La.)	03	Mar 30	2001	Conspiracy to commit theft of gov't property	Affirmed
6	U.S. v. Farner	251 F.3d 510	5th Cir.(Tex.)	05	May 14	2001	Attempting to persuade & entice a minor into sexual activity	Affirmed
7	U.S. v. Fox	248 F.3d 394	5th Cir.(Tex.)	04	Apr 13	2001	Receiving child pornography via computer	Affirmed
8	U.S. v. Garcia	242 F.3d 593	5th Cir.(Tex.)	02	Feb 15	2001	Drug possession with intent to distribute	Affirmed
9	U.S. v. Garcia-Flores	246 F.3d 451	5th Cir.(Tex.)	03	Mar 27	2001	Drug possession with intent to distribute	Affirmed
10	U.S. v. McCauley	2001 WL 630151	5th Cir.(Tex.)	06	Jun 07	2001	Bank fraud, conspiracy to commit bank fraud	Affirmed
11	U.S. v. McClatchy	249 F.3d 348	5th Cir.(Miss.)	04	Apr 19	2001	Crop insurance fraud, money laundering, etc	Affirmed
12	U.S. v. Odiodio	244 F.3d 398	5th Cir.(La.)	03	Mar 09	2001	Bank fraud, wire fraud, money laundering	Affirmed
13	U.S. v. Peterson	244 F.3d 385	5th Cir.(Tex.)	03	Mar 08	2001	Conspiracy to commit mail fraud, wire fraud, money laundering	Affirmed
14	U.S. v. Reyes	239 F.3d 722	5th Cir.(Tex.)	01	Jan 23	2001	Bribery, conspiracy to commit bribery, mail fraud	Affirmed
15	U.S. v. Wilson	249 F.3d 366	5th Cir.(Tex.)	04	Apr 19	2001	Conspiracy, money laundering, mail fraud, etc	Affirmed
15								
15	**2000 Criminal Cases Reviewed**						**100.0% Affirmed on Sufficiency Of The Evidence**	
							0.0% Reversed on Sufficiency Of The Evidence	

FIFTH CIRCUIT DISTRICT JUDGES NEWSLETTER
April 2001

AN EDITORIAL

The Seventh Amendment of the United States Constitution reads as follows:

> In Suits at common law, where the value in controversy shall exceed $20, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

After the United States Supreme Court reversal in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), decided on June 12, 2000, I established the "Was Lost, But Now Found" award noting, from June to December of 2000, the circuit published six or more opinions upholding jury verdicts or finding fact issues to be decided by a jury. Unfortunately, the stream of those cases has trickled down to dry sand during the first quarter of this year.

The worst example is found in the case of *Giles v. General Electric Co.*, 2001 WL 266307 (5th Cir. 2001), wherein the panel of Smith, Jones, and Jolly simply disregarded the verdict of the jury. Plaintiff Giles injured himself while working for General Electric and, once permanently disabled, obtained disability benefits for a period of time, then was authorized to return to work with limitations not to lift more than 50 pounds. The Social Security Administration specifically found his physical condition did not prevent him from performing his employment as had his primary physician and surgeon. The jury found Giles was a qualified individual with a disability and his disability was the motivating factor in General Electric's refusal to rehire him, that the

reasonable accommodation requested would not impose an undue burden on General Electric, and that General Electric failed to make a good-faith effort reasonably to accommodate Giles' disability. The jury awarded $400,000 in compensatory and $800,000 in punitive damages. The district judge, of course, limited the judgment to $300,000 under the statutory cap. The panel affirmed the jury's liability findings, yet made reference to the evidence that Giles, after being rejected for employment, "had trouble sleeping, suffered headaches, and marital difficulties and lost the prestige and social connections associated with his position at GE and his service as treasurer of the local union," and that third parties testified that Giles appeared "despondent, depressed, down, and absolutely, utterly discouraged about not being able to come back to work." Then, the panel holds:

> We cannot say, however, that Giles is entitled to the full $300,000. "There is a strong presumption in favor of affirming a jury award of damages. The damage award may be overturned only upon a clear showing of excessiveness. . . . However, when this Court is left with the perception that the verdict is clearly excessive, deference must be abandoned." *Eiland v. Westinghouse Elec. Corp.*, 58 F.3d 176, 183 (5th Cir. 1995) (citation omitted).

The panel then arbitrarily cut the $300,000 amount to $150,000 (which was less than the attorney's fees) because they "perceived" the jury award too high.

Now I have read and re-read the Seventh Amendment and still cannot find the fine print stating jury findings may be altered or changed by circuit judges when they believe the finding is wrong. It must take an

incredible combination of intellect and life experiences to endow circuit judges with such superior judgment over jurors who have experienced difficulties in life and who observed and listened to the witnesses under the direction of a district judge. And this pattern continues – just look at some of the cases since January:

(a) *Bruff v. North Miss. Health Services, Inc.*, 2001 WL 246354 (5th Cir. 2001), panel Politz, Smith, and Parker reversed trial court judgment of $300,000 (a jury verdict in excess of $2 million) and rendered judgment.

(b) *Serna v. City of San Antonio*, 2001 WL 237241 (5th Cir. 2001), panel Davis, Jolly, and Restani reversed a $500,000 jury verdict and rendered judgment.

(c) *Flowers v. Southern Reg'l Physician Services, Inc.*, 2001 WL 314603 (5th Cir. 2001), panel King, Higginbotham, and Duhé, reduced a $100,000 judgment (a $350,000 jury verdict) to nominal damages.

(d) *United States ex rel. Garibaldi v. Orleans Parish Sch. Bd.*, 2001 WL 246350 (5th Cir. 2001), panel Davis, E. Garza, and Pogue, reversed a $3 million jury verdict and rendered judgment.

(e) *Rodriguez v. Riddell Sports, Inc.*, 242 F.3d 567 (5th Cir. 2001), panel Smith, Jolly, and Jones, reversed a $10 million jury verdict and rendered judgment on some defendants and remanded on one defendant.

(f) *Piotrowski v. City of Houston*, 237 F.3d 567 (5th Cir. 2001), panel Jones, Barksdale, and Dennis, reversed a $20 million jury verdict and rendered judgment.

(g) *Brown v. Kinney Shoe Corp.*, 237 F.3d 556 (5th Cir. 2001), panel Jolly, Smith, and Barksdale, reversed the judgment of $300,000 (jury verdict of $340,990) and remanded for new trial.

(h) *Smith v. Louisville Ladder Co.*, 237 F.3d 515 (5th Cir. 2001), panel Davis and Smith with Dennis dissenting, reversed a jury verdict of $1,487,500 and rendered judgment.

In the last three months, I do not recall a single jury verdict for the plaintiff where the circuit court affirmed liability and the amount of damages awarded. I try to read every single opinion – and, of course, I may have missed one – but I have been looking for it so I could publish it in this newsletter.

In addition to reversing jury verdicts or changing them based on "perceptions," the circuit has continued in its appellate fact-finding ways. The illustrations of appellate fact-finding are usually contained in opinions reversing district judges in the area of "qualified immunity" regarding law enforcement officers and the allegations of excessive force. But just look at some of the recent cases. In *England v. England*, 234 F.3d 268 (5th Cir. 2000), panel of Duhé and E. Garza with DeMoss dissenting, reversed a district judge's factual finding that the return of children to Australia would expose them to psychological harm and held the evidence did not establish that a 13-year-old was "mature enough" to consider her views on where she wished to live. In *Glenn v. City of Tyler*, 242 F.3d 307 (5th Cir. 2000), panel Jones, DeMoss, and Barzilay, the panel reversed the district judge's decision that fact issues existed in an "excessive force" case, holding the officer had reasonable belief that there was probable cause to arrest and evidence that the officer placed handcuffs on the plaintiff too tightly and then placed her in a car with no air conditioner in the sun after being advised that the plaintiff had multiple sclerosis and, when a witness went

over and opened the door so the plaintiff could breath and vomit, the officer yelled at the person attempting to help the plaintiff. The panel found that handcuffing too tightly "without more" cannot amount to excessive force and held that the officer did not act unreasonably as the plaintiff testified she was only in the hot car for about 30 minutes. In *Domino v. Texas Department of Criminal Justice*, 239 F.3d 752 (5th Cir. 2001), panel of Davis, Jolly, and Restani reversed a magistrate judge's determination that there were fact issues in a § 1983 case by holding the "summary judgment evidence would not permit a reasonable jury to conclude that Dr. Reddy knew Domino was a serious suicide risk" after writing for several pages to establish how many professional persons thought he had been a suicide risk. Then, in *McLellan v. American Eurocopter Corp.*, 2001 WL 253098 (5th Cir. 2001), panel DeMoss, Duhé, and E. Garza reversed the findings of fact of a district judge in a bench trial, and a reading of the opinion establishes that the panel simply didn't agree with the trial court on the facts. Or, *Jackson v. OMI Corporation*, 2001 WL 273850 (5th Cir. 2001), panel of Davis, Jolly, and Restanti, where the circuit simply reversed the trial judge's fact-finding of negligence and rendered judgment for the defendants. Still another is *McKenzie v. Lee*, No. 00-30179 (5th Cir. April 5, 2001), where the panel of Jones, DeMoss, and Barzilay, reversed the district judge's factual findings in a discrimination case and rendered judgment for the defendant.

The pattern of some of our circuit judges in reversing or altering jury verdicts and making such appellate fact-findings to eliminate jury trials make it more and more difficult to defend the integrity of our circuit. The bar as a

whole generally believes that our circuit is *result* driven rather than driven by the law, and it is very disheartening to hear competent and experienced trial lawyers state if you tell them who is on the panel, they will tell you the results of the appeal without further investigation.

It is time for all of us, including our brothers and sisters on the circuit, to re-read the Seventh Amendment and enforce it. It has been my experience as a trial lawyer, as well as a judge, that juries rarely err or make wholly unreasonable findings. When this occurs, then the courts should act, but not just because of an attitude that certain people shouldn't win lawsuits, the jury shouldn't award large verdicts, or law enforcement officers should not be required to stand trial.

Supreme Court, U.S.
FILED
AUG 29 200
OFFICE OF THE CLERK

(2)

No. 01-210

In The

Supreme Court of the United States

SANDRA M. BRUFF,

Petitioner,

v.

NORTH MISSISSIPPI HEALTH SERVICES, INC.;
NORTH MISSISSIPPI MEDICAL CENTER,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MICHAEL FARRELL
RICHARD A. HAMMOND
THE KULLMAN FIRM
Deposit Guaranty Plaza – Suite 2160
210 East Capitol Street
Jackson, MS 39201
(601) 355-1994

ERNEST R. MALONE, JR.
THE KULLMAN FIRM
P. O. Box 60118
New Orleans, LA 70160
(504) 596-4105

LUTHER T. MUNFORD*
MARK D. FIJMAN
PHELPS DUNBAR LLP
P. O. Box 23066
Jackson, MS 39225-3066
(601) 352-2300
Counsel for Respondents

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

15 pp

LIST OF PARTIES

The following is a list of all parties to the proceedings in the Court below, as required by this court's Rule 24(b) and Rule 29.1.

1. Sandra M. Bruff, Plaintiff/Petitioner;

2.. North Mississippi Health Services, Inc., Defendant/Respondent;

3. North Mississippi Medical Center, Inc., Defendant/Respondent.

North Mississippi Health Services, Inc. is the parent of North Mississippi Medical Center, Inc. They are both non-profit corporations.

TABLE OF CONTENTS

Page

LIST OF PARTIES i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 1

FACTS 4

REASONS FOR DENYING THE WRIT 6

1. This Court in *Reeves* Considered Questions I, II and III and Rejected Petitioner's Arguments 6

2. Petitioner Did Not Raise Questions I, II, Or III In The Court Of Appeals 8

3. The Fifth Circuit Was Well Aware of *Reeves* 9

4. Even If the Court Wanted to Consider These Questions, This Would Not Be The Case To Do So 9

CONCLUSION 11

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Baz v. Walters, 782 F.2d 701 (7th Cir. 1986) 3

Boeing v. Shipman, 411 F.2d 365 (5th Cir. 1969)... 7, 8, 9

Miller v. Spicer, 822 F. Supp. 158 (D. Del. 1993)..... 3

Reeves v. Sanderson Plumbing Products, 530 U.S. 133 (2000) 2, 4, 6, 7, 8, 9

Singleton v. Wulff, 428 U.S. 106 (1976) 9

Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1997) 2

United Steelworkers v. Weber, 443 U.S. 193 (1979)..... 3

DOCKETED CASES

Reeves v. Sanderson Plumbing Products, U.S. Sup. Ct. No. 99-563 (Jan. 7, 2000) 6, 7

Blake v. Richardson, 1999 WL 319082 at 2 (D. Kan. 1999)..... 3

FEDERAL STATUTES

42 U.S.C. § 2000e(j)..... 1

42 U.S.C. § 2000e-2(a)(1)..... 1

FED.R.CIV.P. 50 7

FED.R.CIV.P. 56 7

MISCELLANEOUS

Emergency Medical Treatment and Active Labor Act, 42 U.S.C. §§ 1395dd 3

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 2000e-2(a)(1):

> It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's . . . religion. . . .

42 U.S.C. § 2000e(j):

> The term "religion" includes all aspects of religious observance and practice as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

STATEMENT OF THE CASE

The Fifth Circuit correctly applied the standards for review of a jury verdict under Title VII. Furthermore:

1. This is not an ordinary Title VII case. It is a religion case. The role of the jury in a religion case is restricted in a way its role in other Title VII cases is not.

The key statute, not quoted in the Petition but quoted above, is 42 U.S.C. § 2000e(j). That language, not found in race, gender, or age statutes, requires a finding concerning what is and what is not a "hardship" to an employer. Because the religious rights of plaintiffs cannot override the religious beliefs of others, this Court has construed

that term to require only a *"de minimis"* showing by the employer. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1997). In that case, this Court treated this question as being a question of law and rendered judgment for the employer. This is not to say that there can never be a fact dispute on the *"de minimis"* issue, but simply to say that such disputes are relatively rare.

The Petition for Writ of Certiorari makes no mention of *Trans World*, or any other Title VII religious discrimination case. In fact, the petition is basically a warmed-over version of points on which petitioner's counsel did not prevail in an age discrimination case, *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133 (2000). Also, the first three questions presented were never raised in the Fifth Circuit.

2. Even as a religious case, this case is unusual. In most Title VII religion cases, the employer's business practices cater to the beliefs of religious majorities. Typically, the plaintiff belongs to a minority religion whose beliefs, such as holy days, conflict with those practices. In this case, the plaintiff's religious views – that homosexuality is a sin – are so predominant in her community that, in *voir dire*, the venire unanimously affirmed that they believed homosexuality is a sin. TT 9:21.

The defendants are a hospital and its parent corporation who had adopted a policy of non-discrimination based on "lifestyle." The hospital is open to everyone. It does not want a medically-needy segment of the population to stay away from the hospital because of a fear of discrimination. It is also aware that discrimination

against homosexuals can give rise to liability under various legal doctrines, including federal regulations and state tort law.[1] The hospital thus finds itself on one of the well-known tightropes created by Title VII. *See United Steelworkers v. Weber*, 443 U.S. 193, 210-11(1979) (Blackmun, J., concurring). The Court of Appeals properly found that the hospital had reasonably accommodated Bruff; to do more would risk further offense to its patients.

As the Court of Appeals accurately described, this case arose when the hospital was informed that counselor Bruff's statements had angered one of her patients because Bruff had expressed her religious opposition to the patient's homosexuality. App. 3. There is no genuine dispute about either what Bruff said or about the employer's report to the hospital. Bruff knows the identity of the patient and offered no evidence to dispute the hospital's report concerning the complaint.

The Fifth Circuit's decision stands for the commonsense proposition that a hospital has a right to enforce a policy against discrimination on the basis of lifestyle, particularly in cases in which a counselor has introduced her own personal religious beliefs into a counseling session and angered a patient who came to her for help. *See Baz v. Walters*, 782 F.2d 701 (7th Cir. 1986) (hospital had

---

[1] *See Blake v. Richardson*, 1999 WL 319082 at *2 (D. Kan. 1999) (construing Emergency Medical Treatment and Active Labor Act, 42 U.S.C. §§ 1395dd); *Miller v. Spicer*, 822 F. Supp. 158, 168-69 (D. Del. 1993) (discrimination gave rise to liability for intentional infliction of emotional distress).

right to instruct even its religious counselors not to proselytize).

FACTS

The respondent hospital does not dispute the statement of facts contained in the Petition, except to the extent stated below. Neither of the two fact disputes petitioner claims are genuine disputes, and the case has an unusual procedural posture not mentioned by petitioner Bruff.

1. The Fifth Circuit correctly disregarded evidence that Bruff was ethically required to discriminate against homosexuals. App. 3 n.4. The evidence was legally irrelevant. The hospital admitted Bruff's religious beliefs were sincere and if her ethical beliefs coincided with her religious beliefs that does not change the case. The question was whether accommodating her beliefs would be an "undue hardship."

Nothing in the analysis calls *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), into question.

2. The Court of Appeals correctly found that Bruff's objections to counseling were inflexible. App. at 12 & n.13. There was no evidence upon which a reasonable jury could find differently.

There were no circumstances under which counselor Bruff said she would be willing to treat a person seeking assistance with a homosexual relationship, or in fact, any person in any activity that Bruff believed to be sinful or anti-social. TT 11:517-19, 11-523. Exs. D-24, D-51. It

demeans Bruff for her counsel to now suggest that she was willing to assist sin on some occasions.

On the other hand, the uniform testimony was that the preferences of other counselors were flexible, *i.e.*, they were willing to see a patient who needed to be seen if no one else was available to see the patient and the patient needed care:

a. As the Petition at 5 n.2 admits, Stella Yeldell said she did not like to counsel children, but never refused to see a child if necessary. TT 9:207-08.

b. There is no testimony that Sandra Holmes "did not like to counsel individuals who had lost family members due to cancer." Petition at 5 n.2. The only thing in the record on this point is a statement in a question by petitioner's counsel that suggested this might be the case. TT 11:605. In any event, there is no testimony that she ever refused such an assignment.

c. Finally, it is simply not true that counselor Bruff's Jewish replacement said she "would not counsel Neo-Nazis." Petition at 5 n.2. Ms. Rappaport testified that she would prefer not to counsel a Neo-Nazi, because of fear, not because of religion. But the issue never came up when she worked in the hospital's EAP and she never indicated that she would absolutely refuse to counsel such a person. PX-24, pp. 16-17, 22. The transcript pages 602-03 do not say anything to the contrary.

It is worth noting that Bruff counsel nevertheless repeated this untruth throughout the trial in a manner that ensured the jury would know Christian Bruff had a

Jewish replacement. The district court repeatedly sustained objections to these gratuitous remarks. TT 11:577, 11:594-57.

3. The unusual jury instructions created a peculiar procedural issue in this case. The Fifth Circuit addressed the two liability issues in the case, *i.e.*, i) whether keeping Bruff in the EAP would cause undue hardship to the hospital, and ii) whether the hospital's offer of accommodation was reasonable.

But the jury instructions did not require this. The jury interrogatories provided that the plaintiff lost on the whole case if she lost on *either* issue. *See* App. 24. By agreeing to that instruction, petitioner Bruff created a situation in which the Fifth Circuit could be half-wrong and she still would lose.

REASONS FOR DENYING THE WRIT

1. This Court in *Reeves* Considered Questions I, II and III and Rejected Petitioner's Arguments.

The questions presented in *Reeves* and answered by this Court dealt directly with the ability of a Court of Appeals to review a jury verdict, which are the same issues raised in questions I, II, III of the petition. In fact, some of the block quotes in the petition seem to have been reproduced, with slight alterations, from the Brief for Petitioners in *Reeves*.[2] Two of the questions presented there were:

---

[2] *Compare* Petition for Writ of Certiorari at p. 16, 19 to Brief for Petitioners, *Reeves v. Sanderson Plumbing Products*, U.S. Sup. Ct. No. 99-563 (Jan. 7, 2000) at p. 46.

2. In determining whether to grant judgment as a matter of law under FED.R.CIV.P. 50, should a district judge weigh all of the evidence or consider only the evidence favoring the non-moving party?

3. Is the standard for granting judgment as a matter of law under FED.R.CIV.P. 56 the same as the standard for granting judgment as a matter of law under FED.R.CIV.P. 50?[3]

This Court answered the questions by saying i) the record must be taken as a whole and ii) that the standard for granting summary judgment mirrors the standard for judgment as a matter of law. 530 U.S. at 150. The Court also found any differences between the standard of review set forth in *Boeing v. Shipman*, 411 F.2d 365 (5th Cir. 1969), and the standards used by other circuits to be "more semantic than real." *Id.*

This Court has thus recently and authoritatively decided the questions raised in the petition concerning the standards to be used in reviewing a jury verdict. It has i) stated the "limits . . . on an appeals court's authority to set side a jury verdict," ii) held that review of the district court decision is *de novo*, and iii) described the standard for distinguishing questions of law from questions of fact.

The petition ignores these holdings in *Reeves* and offers no reason why it should be reconsidered.

---

[3] Brief of Petitioner, *Reeves v. Sanderson Plumbing Products*, U.S. Supreme Court, No. 99-563, Jan. 7, 2000, at p. i.

2. Petitioner Did Not Raise Questions I, II, Or III In The Court Of Appeals.

Despite knowledge of the issues that were being raised before this Court in *Reeves*, petitioner's counsel did not raise any of these issues in the Fifth Circuit. In fact, counselor Bruff's brief relied on *Boeing*[4] and it was the respondent hospital who relied on *Reeves* after it was decided.[5]

Even when counselor Bruff discussed *Reeves* in her Petition for Rehearing, she did not argue these points. Specifically, she:

1. Did not argue that *Reeves* was contrary to *Boeing*, or that the Seventh Amendment had bearing on this case.

2. Did not present any of the statistics found in App. 26-42. Respondent's counsel has no idea as to who prepared these statistics, or the guidelines that were used in preparing them, or their accuracy. They were never tested in a lower court and should not be passed upon here.

3. Did not challenge the ability of a Court of Appeals to review the judgment as a matter of law *de novo*.

4. Did not ask the Court to draw a new distinction between issues of law and issues of fact.

---

[4] Brief for the Appellee – Cross-Appellant, p. 2.

[5] Reply Brief of Appellants and Brief of Cross-Appellees, p. 2.

A court of appeals should not be held to have erred based on arguments that were never presented to it. *Singleton v. Wulff*, 428 U.S. 106, 121 (1976).

3. The Fifth Circuit Was Well Aware of *Reeves*.

As described above, the Fifth Circuit was well aware of the *Reeves* decision when it ruled on this case. There is no reason to entertain the petition's fourth question, which asks that the case be sent back to the Fifth Circuit so it can be done all over again.

Moreover, as shown above, the Fifth Circuit applied the acceptable *Boeing* standard and there are no genuine and material fact issues in this case. In other words, there is no reason to question the manner in which the Fifth Circuit analyzed the case. Even if had not considered *Reeves*, the Fifth Circuit's analysis and result are correct, which is an additional reason the case should not be remanded.

4. Even If the Court Wanted to Consider These Questions, This Would Not Be The Case To Do So.

There are a number of additional reasons why this case would not be an appropriate case to consider the questions the petitioner seeks to present.

1. This a religion case and in such cases the role of the court and jury are different from other Title VII cases, as outlined above.

2. The jury instructions here were peculiar. If the Fifth Circuit was right, for example, that the hospital did not have to keep Ms. Bruff in the EAP, then it was entitled to judgment even if there were some fact issue about the subsequent accommodation, and vice versa.

3. The record in this case is an ugly record, full of appeals to the potential religious prejudice of a jury against not only Jews, but against an "anonymous unknown lesbian."[6]

---

[6] TT. In closing argument, petitioner's counsel said: "The hospital would have you think that an anonymous unknown lesbian patient has more rights than Sandy Bruff." TT 14:1397.

CONCLUSION

For these reasons, the Respondent hospital respectfully prays that this Court will deny the Petition for Writ of Certiorari.

Respectfully submitted,

LUTHER T. MUNFORD
MARK FIJMAN
PHELPS DUNBAR LLP
P. O. Box 23066
Jackson, MS 39225-3066
Telephone: (601) 352-2300
Facsimile: (601) 360-9777

ERNEST R. MALONE, JR.
THE KULLMAN FIRM
P. O. Box 60118
New Orleans, LA 70160
Telephone: (504) 596-4105
Facsimile: (504) 598-0004

MICHAEL FARRELL
RICHARD A. HAMMOND
THE KULLMAN FIRM
Deposit Guaranty Plaza –
Suite 2160
210 East Capitol Street
Jackson, MS 39201
Telephone: (601) 355-1994
Facsimile: (601) 355-1998

Attorneys for North Mississippi Health Services, Inc., and North Mississippi Medical Center

(3)

No. 01-210

Supreme Court, U.S.
FILED
SEP 26 2001
CLERK

In The

Supreme Court of the United States

SANDRA M. BRUFF,

Petitioner,

v.

NORTH MISSISSIPPI HEALTH SERVICES, INC.;
NORTH MISSISSIPPI MEDICAL CENTER,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JIM WAIDE
MS BAR NO.: 6857
(*Counsel of Record*)

WAIDE & ASSOCIATES, P.A.
Attorneys at Law
Post Office Box 1357
Tupelo, MS 38802
Telephone: (662) 842-7324
Facsimile: (662) 842-8056

Counsel for Petitioner

GRANT M. FOX
MS Bar No.: 8943

FOX & FOX, P.A.
Attorneys at Law
Post Office Box 797
Tupelo, MS 38802
Telephone: (662) 844-2068
Facsimile: (662) 844-1068

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

11 68

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

REPLY ARGUMENT I 1

PETITIONER PRESENTED TO THE FIFTH CIRCUIT HER ARGUMENT THAT THE FIFTH CIRCUIT'S STANDARD OF REVIEW FOR JURY VERDICTS CONTRAVENES *REEVES V. SANDERSON PLUMBING PRODUCTS, INC.*, 530 U.S. 133 (2000) 1

REPLY ARGUMENT II 2

CERTIORARI SHOULD NOT BE DENIED ON THE GROUNDS THAT *REEVES* HAS ALREADY ANSWERED THE QUESTIONS PRESENTED IN THE PETITION 2

CONCLUSION 6

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 3

Boeing v. Shipman, 411 F.2d 365 (5th Cir. 1969).....1, 5

Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) 6

Parsons v. Bedford, Breedlove & Robeson, 28 U.S. 433 (1830) 3

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000) 1, 2, 3, 4, 5, 6

Rubenstein v. Administrators of the Tulane Educ. Fund, 218 F.3d 392 (5th Cir. 2000)..... 2

Vadie v. Mississippi State University, 218 F.3d 365 (5th Cir. 2000)..... 2

OTHER AUTHORITIES

Kevin M. Claymont and Theodore Eisenburg, *Plantiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments,"* ___ Univ. Ill. L. Rev. ___ (forthcoming)..... 4

Professor William V. Dorsaneo, III, *"Re-Examining the Right to Trial by Jury,"* 54 S.M.U. L. Rev. ___ (forthcoming).....1, 5

Victoria A. Farrar-Myers, *"Echoes of the Founding: Modern Day Jury as Conferrer of Legitimacy,"* ___ S.M.U. L. Rev. ___ (forthcoming)..... 6

Alison Jones, 48 Louisiana L. Rev. 6 (Feb. 2001)..... 2

New York Times, March 2, 2001, *Juries, Their Powers Under Siege, Find Their Role is Being Eroded*, May 7, 2000 7

TABLE OF AUTHORITIES – Continued

Page

Sam Sparks, *Fifth Circuit's District Judge's Newsletter*, April 2001, App. 43 to Petition for Writ of Certiorari 7

The Dallas Morning News series *JURIES ON TRIAL, Right to Trial Faces Under Court Rulings, and Powershift: Laws are Snatching Authority From Jurors and Transferring it to the Hands of Judges*, May 7, 2000 7

Charles A. Wright, "The Doubtful Omniscience of Appellate Courts," 41 Minn. L. Rev. 751 (1957) 4

Charles A. Wright, Arthur R. Miller and Mary Kay Kane, *Federal Practice & Procedure*, § 2819 (2d ed. 1995) 6

REPLY ARGUMENT I.

PETITIONER PRESENTED TO THE FIFTH CIRCUIT HER ARGUMENT THAT THE FIFTH CIRCUIT'S STANDARD OF REVIEW FOR JURY VERDICTS CONTRAVENES *REEVES V. SANDERSON PLUMBING PRODUCTS, INC.*, 530 U.S. 133 (2000).

Respondents claim the argument that the Fifth Circuit's method of review of jury verdicts conflicts with *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000) was not contained in Petitioner's brief to the Fifth Circuit.

Petitioner's Fifth Circuit brief was filed on June 12, 2000, the very day *Reeves* was decided. In that brief, Petitioner notified the court that *Reeves* was pending in the Supreme Court, Fifth Circuit Appellee's brief, p. 12, fn 12, and Respondents then argued, in its reply brief, that *Reeves* did not change the rule of *Boeing v. Shipman*, 411 F.2d 365 (5th Cir. 1969), and chastised Petitioner for "advocating departure from the *Boeing v. Shipman*"[1] standard of review. Fifth Circuit Appellants' brief, p. 1.

After the Fifth Circuit rendered its opinion for the jury verdict loser by relying on *Boeing v. Shipman* and ignoring *Reeves*, Petitioner then argued in the first eleven (11) pages of her Petition for Rehearing that the Fifth

---

[1] The *Boeing v. Shipman* standard of review contravenes *Reeves*. The *Boeing v. Shipman* standard of review does not contain *Reeves'* direction that the court must disregard movant's contradicted evidence and, thus, permits "a reviewing court to compare [weigh] conflicting inferences . . . at variance with the principles clearly stated in Reeves." Professor William V. Dorsaneo, III, *"Re-Examining the Right to Trial by Jury,"* 54 S.M.U. L. Rev. ___, pp. 149-151 (forthcoming).

Circuit had contravened *Reeves* by accepting as true facts which *Reeves* required be disregarded.

The fact that the Fifth Circuit does not regard *Reeves* as the controlling standard on directed verdicts, but continues to adhere to its 1969 precedent in *Boeing v. Shipman*, is also made clear in Professor William V. Dorsaneo, III, *"Re-Examining the Right to Trial by Jury,"* 54 S.M.U. Law Rev. ___, p. 150 (forthcoming):

> Even worse, two Fifth Circuit panel decisions – one regarding Tulane University[2] and the other concerning Mississippi State University[3] – cite *Boeing* as if *Reeves* changed nothing about the process of evidentiary review.

Based on these same Fifth Circuit precedents, another writer has remarked that the "Fifth Circuit was still in denial" concerning *Reeves*.[4]

REPLY ARGUMENT II.

CERTIORARI SHOULD NOT BE DENIED ON THE GROUNDS THAT *REEVES* HAS ALREADY ANSWERED THE QUESTIONS PRESENTED IN THE PETITION.

Respondents argue that Certiorari is unnecessary because *Reeves* has already stated "the limits . . . on an appeals court's authority to set aside a jury verdict."

---

[2] *Rubenstein v. Administrators of the Tulane Educ. Fund*, 218 F.3d 392, 401 (5th Cir. 2000).

[3] *Vadie v. Mississippi State University*, 218 F.3d 365, 372 (5th Cir. 2000).

[4] Alison Jones, 48 Louisiana L. Rev. 6, 512 (Feb. 2001).

Respondents' brief, p. 7. While *Reeves* did "state limits on a court's authority to set aside a jury verdict," the Fifth Circuit disregarded those limits. Petitioner's Petition for Rehearing describes many instances in which the appeals court accepted facts which were contradicted by Petitioner (non-movant's evidence) all in contravention of *Reeves*. Petitioner's Fifth Circuit's Petition for Rehearing, pp. 1-11. When an appellate court, in granting judgment as a matter of law, fails to cite a controlling Supreme Court precedent and violates the principles which that precedent established, exercise of this Court's supervisory authority under Rule 10 is appropriate.

Additionally, *Reeves* did not address the primary issue in this case which involves the Seventh Amendment's "Re-Examination Clause." *Reeves*, 530 U.S. at 550 and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-251 (1986) both state that the Rule 56 summary judgment standard "mirrors" the Rule 50 judgment as a matter of law standard. However, the Re-Examination Clause which affects the Rule 50 standard but has no bearing on the Rule 56 standard is not mentioned. An essential issue here is whether the Seventh Amendment's Re-Examination Clause, limiting appellate review to the rules of the common law, permits an appeals court to overrule a jury verdict and render judgment for the jury verdict loser whenever it finds, without following *Reeves'* direction to disregard the movant's contradicted evidence, that the jury was not "reasonable." This rule simply departs too far from the common law rule as to be constitutional. As stated in *Parsons v. Bedford, Breedlove & Robeson*, 28 U.S. 433, 447-448 (1830):

> This is a prohibition to the courts of the United States to re-examine any facts tried by a jury in any other manner. The only modes known to the common law to re-examine such facts, are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable; or the award of a *venire facias de novo*, by an appellate court, for some error of law which intervened in the proceedings.

The Fifth Circuit's practice of conducting whole record review and disregarding *Reeves* by accepting facts alleged by movant which are contradicted by non-movant's facts, and then rendering judgment for the jury verdict loser on the grounds that the jury was not "reasonable," is irreconcilable with the common law rule of no appellate review at all of the sufficiency of the evidence to support a jury verdict. That the appellate courts have gone way too far in reversing jury verdicts as "unreasonable" is proven by the statistics cited in the appendix to Petitioner's brief, and is also documented by a recent academic study. *See* Kevin M. Claymont and Theodore Eisenburg, *Plantiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments,"* ___ Univ. Ill. L. Rev. ___, pp. 2-3 (forthcoming); and is condemned by Charles A. Wright, *"The Doubtful Omniscience of Appellate Courts,"* 41 Minn. L. Rev. 751, 782 (1957) ("The best way to do justice in the long run is to confine to a minimum appellate tampering with the work of the trial courts").

That appellate courts have gone way beyond "minimum tampering" with jury verdicts is documented in the forthcoming fall 2001 Southern Methodist University Law

Review, which devotes a special issue to the diminishing right to trial by jury. An article by Professor William V. Dorsaneo, III, *"Re-Examining the Right to Trial by Jury,"* 54 S.M.U. L. Rev. ___ (forthcoming), argues Petitioner's point that *Boeing v. Shipman* is at "variance with the principles clearly stated in *Reeves,*" and calls for *Boeing* to be rejected. *Id.* at 137.

Nearly as important as the Fifth Circuit's disregarding *Reeves* and enunciating a standard that cannot be reconciled with the Seventh Amendment's Re-Examination Clause is the fact that the decision in this case also invades the jury's function by characterizing fact issues as legal issues. The Fifth Circuit held, as a matter of law, that it was an "undue hardship" to keep Petitioner in the EAP Unit. This ignored Petitioner's evidence that there was no lawful hardship at all since the legal ethics of Petitioner's profession required her to refer patients whose beliefs conflicted with hers. Labeling issues of fact as issues of law is another infringement on the Seventh Amendment right to jury trial described by Professor Dorsaneo:

> . . . The first important right [inherent in the Seventh Amendment] is the right to have a jury decide whether the defendant's conduct violated or conformed to the applicable legal standard, rather than only more basic factual questions about "what happened." . . .

Id. at 108-109.

. . .

> It would be a sad irony if the reexamination clause of the Seventh Amendment caused federal appellate courts to routinely recharacterize

> questions of fact as law questions to facilitate or justify appellate review. As Professor Wright and others have reasoned, recasting fact questions as law questions is really an obvious subterfuge.[5]

Id. at 189.

CONCLUSION

As Chief Justice Rehnquist wrote in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 343 (1979):

> The founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary.

The shocking rates at which appellate courts are setting aside jury verdicts as not being "reasonable" is the subject of such national attention that it has sparked a full issue in the forthcoming fall 2001 issue of the Southern Methodist University Law Review; inspired an entire series of national newspaper columns;[6] and ignited protest from one of the Fifth Circuit's own district judges,

---

[5] Charles A. Wright, Arthur R. Miller and Mary Kay Kane, *Federal Practice & Procedure*, § 2819, at 202-03 (2d ed. 1995) ("This argument is so purely verbal, and its implications for the Seventh Amendment so plainly devastating, that it has been rejected even by those who support appellate review of those orders.").

[6] *See also* Victoria A. Farrar-Myers, *"Echoes of the Founding: Modern Day Jury as Conferrer of Legitimacy,"* ___ S.M.U. L. Rev.

Sam Sparks, *Fifth Circuit's District Judge's Newsletter*, April 2001, App. 43 to Petition for Writ of Certiorari.

At this time of national crisis, this case addresses two (2) of this nation's most important rights – rights which differentiate it from those of our attacker – the right to trial by jury and the right to religious freedom.

Respectfully submitted,

WAIDE & ASSOCIATES, P.A.

JIM WAIDE
MS Bar No.: 6857

WAIDE & ASSOCIATES, P.A.
Attorneys at Law
Post Office Box 1357
Tupelo, Mississippi 38802
Telephone: 662-842-7324
Facsimile: 662-842-8056

Attorneys for Petitioner

___ (forthcoming); The Dallas Morning News series *JURIES ON TRIAL, Right to Trial Faces Under Court Rulings, and Powershift: Laws are Snatching Authority From Jurors and Transferring it to the Hands of Judges*, both May 7, 2000; New York Times, March 2, 2001, *Juries, Their Powers Under Siege, Find Their Role is Being Eroded* states that "scholars argue that appeals judges are now substituting their own opinions for those of jurors."